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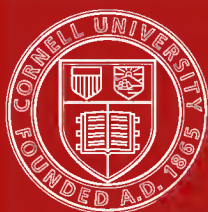
IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS



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A COURSE OF LECTURES
ON
THE GOVERNMENT, CONSTITUTION, AND LAWS
OF
SCOTLAND.

A COURSE OF LECTURES

ON THE

GOVERNMENT, CONSTITUTION, AND LAWS

OF

SCOTLAND,

FROM THE EARLIEST TO THE PRESENT TIME.

BY

ALEXANDER ROBERTSON, M.A.

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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P R E F A C E.



IN the Albert Institute, Dundee, nearly three years ago, I delivered a Course of Seven Lectures on the Government, Constitution, and Laws of Scotland. I adapted these lectures, as far as possible, to a popular audience, and was rewarded with an amount of success far exceeding my most sanguine expectations. Formerly, my intention was to make these lectures the basis of an elaborate work on the History of the Constitution and Legal Institutions of Scotland; but, for the present, I am obliged to abandon my original scheme. To my lectures, however, I have, in the following pages, made several additions, which will, I hope, enable the reader to pursue his studies with greater satisfaction to himself than he could have done had the lectures been printed in the exact form in which they were delivered. In particular, I hope that the translations, in the first lecture, from Cæsar and Tacitus, will throw greater light upon a most obscure part of Scottish History than the meagre outline which, in 1875, I adopted from these authors; and that the new matter, in the Sixth and Seventh Lectures, bringing down my subject to the present date, will show pretty clearly what has been done by the legislature since the lectures were delivered.

With these observations, and in the most perfect confidence that I will receive ample justice at the hands of intelligent and impartial critics, as well as intimate friends, I humbly submit the following work to the judgment of the public.

To my friends JOHN CAMPBELL SMITH, Esq., Advocate, Edinburgh, and JAMES SUTHERLAND COTTON, Esq., Barrister-at-Law, London, I take this opportunity of acknowledging my great obligations for their assistance and valuable suggestions while this work was going through the press. I have also to thank my friend J. D. GRANT, Esq., Solicitor, Dundee, for assisting me in bringing down the Seventh Lecture to the present date.

November 1878 :

2 PLOWDEN BUILDINGS,
TEMPLE.

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A COURSE OF LECTURES
ON
THE GOVERNMENT, CONSTITUTION, AND LAWS
OF
SCOTLAND.

LECTURE I.

FROM THE EARLIEST TIMES TO THE FIRST YEAR OF THE REIGN OF
MALCOLM CANMORE (500 B.C. TO 1057 A.D.)

INTRODUCTION.—The course of Lectures which, by the kindness of the Directors of the Dundee Public Library, I am to deliver in this Hall, will, I hope, give you a general outline of the history of the Laws and legal institutions of our country. Grave doubts rest in my own mind as to how far the subject which I propose to treat is adapted for popular exposition; but, if you will kindly extend your utmost attention

and forbearance towards me, I shall do all I can to render my Lectures as interesting as circumstances will allow. That the subject is worthy of calm and serious deliberation cannot be doubted; for it comprehends a brief survey of the great historical events of our native land, and the causes which have brought about the present state of our government, constitution, and laws. Than a knowledge of our imperial constitution and local and imperial government, what can be more important? Than a general idea of the great principles of our law, what can be more useful? Certainly, no mere secular knowledge can be justly preferred to them; for our laws are the fundamental principles of our national morality, and deal with the daily and hourly concerns of our lives, honours, and fortunes; and our governmental institutions are the modes by which the national will is expressed, and the laws carried into execution. The ancient Romans, Cicero tells us, committed their Twelve Tables to memory. Unfortunately, however, we have nothing corresponding to that code of Roman law; but rather a heterogeneous mass of statutes, decisions, and customs, from which a clear and well-defined system is not easily extracted. But difficulties in the way of accomplishing a great and good object must never deter us from doing what we can to supply a public want; and, although failure may attend my efforts, I intend, at all events, to try to clear the way for other explorers in a most fruitful field of inquiry.

With these preliminary observations, I have this evening to invite you to consider the origin and early history of Scotland and its inhabitants.

FIRST EPOCH.—PRIMITIVE, OR THE ORIGIN AND EARLY HISTORY OF
SCOTLAND AND ITS INHABITANTS.

FIRST PERIOD.—THE ABORIGINES.

1. *Scotland divided into petty states.*—The modern kingdom of Scotland, which, in ancient times, was divided into a large number of petty states, was unknown by its present name till the 10th century, and its existing boundaries on the north and south were not fixed till the 14th. Herodotus and Aristotle refer to Britain and Ireland as the Cassiterides, and the Roman classical authors call the whole country between the English Channel and the Pentland Firth Britannia. The earliest known inhabitants of Scotland were nomadic in their habits, and at the commencement of the Christian era could hardly have exceeded 200,000. They were then rude, fierce, and barbarous; were divided into numerous states or clans, which were frequently at war with each other.

2. *Primitive Scotland.*—There were fifteen clans or septs which occupied Scotland at the time of the Roman government in Britain. The chief races or families were the Vecturiones, Selgovæ, Novantes, Picti, Attacoti, and Scoti. All these belonged to the Celtic family of nations. To these we must add the Teutons, who subsequently invaded Scotland, *i.e.* the Saxons, Danes, and Normans, in order to obtain a complete list of the races which ultimately formed our heterogeneous nationality. For the present, however, the Picts and Scots will chiefly engage our attention. Therefore, before proceeding

to consider the Roman invasion, and its effects in civilizing the northern parts of Britain, let us try to find out who the Celts were, and whence they came.

3. *The aborigines of Britain were Celts.*—The aboriginal inhabitants of Britain were the Celts, and spoke the Gaelic or Cumraig dialect. They belonged to the Kimmerian race, from whom Camillus (400 B.C.) and afterwards Marius (100 B.C.) saved the Roman people. They formed part of those tremendous devastating hordes by which Central Asia was, for many centuries, relieved of a superabundant population, and Eastern Europe was overwhelmed, and also reinvigorated, by the influx of a strong and courageous race of men. Afterwards the Goths, who came from the same region, and belonged to the same great Aryan family of nations as the Celts, but spoke a different dialect, drove large numbers of the latter to the western extremities of Europe about 500 B.C.; and, according to Herodotus, this was about the time when the Celts took possession of Britain. Tacitus refers to the Picts by the name of Caledonians, and Bede states that they came originally from what is now Persia, and, not finding a settlement in Ireland, sailed to Scotland.

4. *No authentic information till Cæsar and Tacitus.*—Previous to the Christian era, no writing exists to give us any authentic information in regard to the habits and customs of our Scottish ancestors. I will therefore lay before you, in the words of the authors themselves, the information which, on these matters, has been left us by Cæsar, the father of English history, and by Tacitus, the father of the history of Scotland.

5. *Cæsar says the southern Britons are like the*

Gauls.—Speaking of the southern Britons, Cæsar, who wrote his Commentaries between 55 and 46 B.C., says (V. 12-14) that they were very numerous; had many buildings, which resembled those of the Gauls, and large herds of cattle, and used brass and iron of definite weights for money. The more civilized inhabitants by far dwelt in Kent, and did not much differ in their customs from those who lived in Gaul. Those in the interior did not sow corn, but lived on flesh and milk, and clothed themselves with skins. All the Britons painted their bodies a blue colour, and by this means had a fierce look in battle. Cæsar also alleges that polyandry existed amongst the Britons. His words are: “Uxores habent deni duodenique inter se communes, et maxime fratres cum fratribus, parentibusque cum liberis; sed si qui sunt ex his nati, eorum habentur liberi quo primum virgo quæque deducta est.”

6. *Three classes amongst the Gauls.*—Turning to Cæsar’s account of the Gauls (VI. 13-19) we find that there were two classes of men esteemed honourable, and that the common people were almost slaves. The two upper classes or orders were the Druids and knights.

7. *The Druids.*—They were engaged with divine things, superintended public and private sacrifices, expounded the obligations of religion, and instructed a great number of the youth. They decided almost all public and private controversies. If any wrong was committed, or any slaughter done, or if any dispute arose about an inheritance or boundaries, they gave judgment, and awarded the compensation or punishment; and if any one, public or private, did

not obey their decision, he was interdicted from the sacrifices. This punishment was very heavy; for those interdicted were ranked as impious and wicked; all fled from them, and avoided their approach and speech, lest any mischief should befall them from the contagion. Cæsar says the Druids taught their pupils and the people that the soul never died, but, after death, passed from one man into another; and that, by a disregard of death, manliness was stirred up within men's breasts. He also tells us that they taught the youths many things as to the nature of the heavenly bodies, their motions, the size of the world and this earth, and the nature of things, and discussed the power and strength of the immortal Gods.

8. *The Knights*.—The other great class was that of the Knights. These, when the occasion of war demanded (and before the arrival of Cæsar wars either of aggression or defence were almost perpetual), all took their place in battle. Each according to his rank and wealth was followed to the field by vassals and squires.

9. *Family Relations*.—Cæsar also tells us that reverence of parents by children was inculcated and strictly practised amongst the Gauls; that they did not allow their children, unless they had come of age, and were able to bear arms, to approach them; and that they considered it disgraceful for a son in his boyhood to stand in public in the sight of his father. With regard to marriage, he says, that an estimate was made of the value of the dower brought by a wife to her husband, and the husband contributed an equal amount to the common stock. An account was kept of the

annual proceeds, and the whole, both of the original stock and of the proceeds, ultimately fell to the survivor. The men had the power of life and death over their wives and children. When any illustrious person died, his relatives assembled. If there was anything suspicious about his death, they instituted an inquiry by torture amongst the wives; and, if any thing was found out, they put them to death with fire, and most terrible cruelties.

10. *The Council*.—The best ordered states in Britain enforced the following rule:—That all rumours from abroad affecting public matters should be immediately communicated to the Magistrates, but carefully kept secret from the general public. The Council had the sole right of discussing affairs of state.

Such is Cæsar's account of the Gauls, who may be taken as representative of our Celtic ancestors in Britain. Let us now see what he says (VI. 21-23) in regard to the Germans, who may be looked upon as similar in manners and customs to the Teutonic tribes who invaded the whole of Britain in the 4th and subsequent centuries of the Christian era.

11. *Land tenure and Government*.—The ancient Germans did not attend to agriculture, and the chief part of their food consisted of milk, cheese, and flesh. None had a definite portion of ground with fixed boundaries. The magistrates and the chiefs, who were elected yearly, determined who were to dwell together, what and where they should have fields, and enforced a fresh distribution in the following year. When a state carried on war, offensive or defensive, magistrates were specially chosen to command with

the power of life and death. In peace, there was no common magistrate; but the head men of districts and of villages laid down the law for their fellows, and decided controversies. Robberies committed beyond the territories of their own state brought no disgrace, and they permitted these offences in order to sharpen their youth, and to diminish want. When any chief announced in council that he would lead forth some expedition, those who wished pledged themselves to follow him; and if any of them broke their pledges and stayed at home, they were esteemed deserters and perjured, and afterwards looked upon as faithless.

Let this suffice for what Cæsar says as to the habits, manners, and customs of the Teutonic people. I proceed to the statements which were made by Tacitus about a century later.

12. *Tacitus on the customs of the people of Germany.*—Tacitus, *Germania*, c. 6 to 27, treating of the manners, customs, and people of Germany, says that the Germans seldom had swords, but used sharply-pointed javelins. For the army, 100 men were sent from every village; and the “hundred,” which was originally a mere number, had become the name for a special class. In the choice of their kings they were determined by nobility of race; in that of their generals, by personal bravery. The power of the kings was neither unbounded nor arbitrary; and the generals procured obedience not so much by authority as by their own example. None except the priest was allowed to exercise coercion, or sentence to bonds or stripes; and, when the priests inflicted punishment, their authority was regarded as higher than that of a general

and as if emanating from the Deity. Therefore they took the images and emblems of their Gods along with them to battle. In hostile operations, families and tribes who were related combined together, and their wives and children accompanied them to battle. In truth, they even believed their women endowed with power from above, and with the spirit of prophecy; and the tribe of the Sitones had women for their sovereigns. They were addicted beyond the rest of mankind to lots and auguries; their priests interpreted those which were public, and the fathers of families those which were private. They placed reliance on the flight of birds, and even the neighing of horses. But this was the most characteristic omen by which they anticipated the result of their wars: They compelled a captive from the enemies' side to fight in single combat with a champion of their own, and accepted the issue of the duel as a presage of the war.

13. *National councils.*—The chiefs determined affairs of small moment, while the whole nation deliberated about those of higher importance, but in such a manner, that whatever depended on the pleasure and decision of the people was previously examined and discussed by the chiefs. When there was no special emergency there were regular assemblies at the new and full moon. At these assemblies the priests enjoined silence, and were invested with the power of correction. All sat down, and all were armed. Then the king or chief was heard, and the rest in order, according to their precedence in age, nobility, warlike renown, or eloquence. The people expressed their displeasure by an inarti-

culated murmur, and their approval by brandishing their javelins. In the assembly, accusations were presented, and capital offences prosecuted. Punishments varied according to the character of the crime. Traitors and deserters were hung. For lighter transgressions the delinquents, on conviction, were commanded to pay a fine of horses or cattle. Part of the fine went to the king or community, and part to him whose wrongs were vindicated, or to his nearest kindred. In the same assemblies were also chosen chiefs or rulers, and those who administered justice in the villages and burghs; and to each of these latter officials 100 persons were assigned for assistance and counsel.

14. *Rules of marriage and inheritance.*—Almost alone among barbarians, the Germans, as a rule, were content to have each but one wife; and the husband, not the wife, gave the dowry. Useful gifts of a warlike kind were given to the husband; and the parents and relations of the parties attended the marriage, and declared their approbation. Children were held in the same estimation by their mother's brothers as by their own father. But to every man his own children were his heirs and successors. Wills they had none, and for the want of children the next of kin inherited.

15. *Compensation for homicide.*—All the enmities, as well as friendships, of one's house, whether of father or kindred, had of necessity to be adopted. But even for homicide, compensation might be made with a fixed number of sheep and cattle, and by this means the whole family was pacified.

16. *Slaves and freedmen cultivated the land and*

paid rent.—The tenants were slaves, and obliged to pay to their lords a certain quantity of grain, cattle, or clothes. They seldom exercised severity towards their slaves, but if they killed them, no vengeance or penalty followed. Freedmen, after emancipation, were held in but little higher regard than slaves.

Such is the information which we derive from the *Germania* of Tacitus ; and I think we can hardly fail to notice many points of resemblance between the manners and customs of the ancient Germans and those of the early inhabitants of Britain, and may even detect some of the practices of our ancestors at a time not far beyond our own times, and, it may be, still surviving in our midst.

17. *Tacitus thought the Caledonians were Germans.*—Tacitus, in his life of Agricola, gives us some additional particulars as to the people of Britain. He says that it was in the time of Agricola that Britain was first circumnavigated, and it was then that the Orkneys were subdued by the Romans. He was also of opinion that the red hair and large limbs of the Caledonians showed them to be Germans ; and that the swarthy complexion, curly hair, and situation as regards Spain of the Silures, who occupied a large part of Wales and two of the adjoining counties of England, furnished grounds for supposing that the ancient Iberians had arrived in Britain from thence. He further says that, before the Roman invasion, the Britons had been subject to kings ; and, in his time, were swayed by various chiefs, and torn by factions ; and rarely did two or three communities assemble together to consult for the common safety.

Having here given such lengthy extracts from Cæsar and Tacitus as to the ancient inhabitants of Britain, I proceed briefly to consider the state of affairs in Britain, and, of course, especially in Scotland, after the Roman invasion.

SECOND.—THE ROMAN PERIOD.

18. *Britain was invaded by Cæsar B.C. 55.*—The progress of the eastern hordes in western Europe brought the Germans and the Celts face to face in Gaul, and the constant feuds of the Celtic inhabitants amongst themselves caused the Germans to be called in as allies by the military class, and the Romans by the priestly. The result was, that Cæsar drove the Germans beyond the Rhine, and Gaul was reduced to a Roman province. The Belgæ were the last to yield to the Roman yoke; and, as they had received aid from their kinsmen in the south of Britain, Cæsar resolved to invade our island to punish those who had given assistance to the enemies of Rome. The Belgic Britons were alarmed by the tidings which they received of Cæsar's intentions, and accordingly sent ambassadors to the Roman commander to sue for peace, and offer hostages for their future good behaviour. Cæsar declined their proposals, embarked for Britain at Portus Iccius or Boulogne with the 7th and 10th legions in 80, and his cavalry in 18 vessels. This was in 55 B.C. When Cæsar landed in the south of our island, the Britons fled to the interior. The British chiefs sent messengers to Cæsar promising obedience and offering hostages, and thereupon terms of peace

were arranged. These matters were no sooner settled than the chiefs, or, as they have often been called, kings; of whom there were then four in Kent, joined in a confederacy against the Romans. Cæsar was enraged at this duplicity, resumed the war, and defeated his enemies. He then returned to Gaul for the winter, and came back to Britain in the following spring. On his second invasion he had 5 legions and 2000 cavalry in 800 ships. The Britons fled in terror, and were afterwards defeated by the Romans. But the native tribes, thinking that their disasters chiefly arose from their own dissensions, settled their differences, and chose Cassivellaunus as their common leader. All their efforts, however, were in vain, and the various tribes one by one surrendered to the victorious Romans. Peace was made, tribute was to be paid, hostages were given, and Cæsar again returned to Gaul in the same year. Cæsar never advanced beyond the southern parts of Britain. Thus began in Britain the Roman dominion, which, with various success and extent of territory, subsisted for more than four centuries.

19. *Brief sketch of the progress of the Roman arms to the time of Agricola.*—Nothing of any consequence happened in Britain for nearly a century. This was in consequence of the frequent bloody civil wars waged in the imperial city itself. In A.D. 43 the Emperor Claudius sent Aulus Plautius to quell some disturbances which had arisen in Britain. Plautius was the first governor of consular rank in this country. He undertook the command of the Roman forces in Britain, and conquered the south-eastern district. Soon afterwards Vespasian reduced

the south-western territory, which was then held by the Belgæ and the Damnonii ; and in A.D. 50, Ostorius Scapula, who was also of consular dignity, erected forts from the River Avon to the Severn, defeated the Iceni, who dwelt in Norfolk and Suffolk, and forced them to submission. Ostorius also vanquished the fierce and uncultivated Brigantes, who occupied the shires of York, Lancaster, Westmoreland, and Cumberland, and also the formidable Silures, who held those of Radnor, Brecknock, and Glamorgan, in Wales ; and sent their king, Caractacus, as a prisoner to Rome. He then directed his attention to the internal government of the country which had been subdued by the Romans. Camulodunum, supposed to be Maldon in Essex, was raised to the rank of a colony, and made the Roman headquarters ; and Roman veterans were established in the territories which had been conquered. Eight years later, A.D. 58, great disorders had been stirred up by the Druids in the districts held by the Silures and the Brigantes. These were quelled by Caius Suetonius Paullinus, and the groves of the Druids in Mona or Anglesea were levelled to the ground. About this time the southern Britons, who had been reduced under the power of the Romans, and their territories formed into a Roman province, groaned under the grievous oppressions of their conquerors, and bitterly complained of the tyranny of the governor-general over their bodies and lives, and of the imperial procurator over their property and fortunes. In particular, the Trinobantes had been deprived of their lands in order to make way for the Roman veterans, and they themselves were treated as slaves. The outrages

of the veterans and the license of the common soldiers caused the Iceni and Trinobantes to combine their forces, attack the colony of Camulodunum, raze it to the ground, give no quarter, and inflict extreme cruelty on the Romans and their confederates. The Iceni had Boadicea for their Queen, and they revolted because of the brutal treatment which had been inflicted on the Queen's two daughters. The Roman governor-general defeated Boadicea's forces with great slaughter; and the heroic Queen, despairing of obtaining justice or freedom for her country, ended her days by taking poison. Suetonius, by whom the Britons had been cruelly treated, was recalled to Rome, and was succeeded by Petronius Turpillanus, a man of milder temper than his predecessor. In A.D. 78, the Britons rose against their Roman conquerors; and in the same year the government of what was then a Roman province, that is to say, the part of Britain nearest Gaul, was entrusted to Julius Agricola, who was of consular rank. He was a great statesman as well as a great general; and his exploits in Britain are recorded by his son-in-law, Tacitus the historian. These exploits bring us to that part of Britain with which we shall hereafter be most chiefly concerned.

20. *Agricola greatly advanced civilization in Britain.*—Agricola, on his arrival in Britain, erected forts and garrisons throughout all the known and important places of his province; and, by his mild and gentle treatment of those who were under his authority, brought them to love the Roman customs. He passed the Firth of Forth, and subdued several nations till then unknown to the Romans, and built forts on the

Scottish coast opposite to Ireland. He determined to signalize his term of office, not only by the greatness of his victories, but also by the wisdom, justice, and uprightness of his government. Accordingly, in order that the British provincials, wild and dispersed over the country, and therefore easily instigated to war, might, by a taste for pleasure, be reconciled to inactivity and repose, he first of all privately exhorted and publicly assisted them to build temples, houses, and places of assembly. He also took care to have the sons of the chiefs taught the liberal sciences, and they soon began to be fond of the Roman language and eloquence, and frequently to wear the Roman apparel and toga. Nay more, and what was not so good, we are informed by Tacitus, that they became enamoured of the dissolute incitements of their conquerors, and at last were charmed with their vices! During the year 80 A.D., Agricola secured his acquisitions to the mouth of the Tay, and overran several tribes or nations; and, in 81 A.D., he erected forts between the Clyde and the Forth to protect the fruits of his victories.

21. *The Caledonians are defeated.*—The year 83 A.D. was distinguished by the Caledonians betaking themselves to arms, and assailing the Roman forts which had been erected for the protection of the Roman province in Britain. The Caledonians were defeated. After this contest the Roman army determined to see the utmost limits of Britain; and, on the other hand, the north Britons, losing nothing of their high spirit, armed their young men, removed their wives and children to places of security, and, in a general convention of their several communities, engaged in a

league for their mutual defence against the Romans, and ratified the engagement by solemn sacrifices. When the summer of 86 arrived, Agricola reached the Grampian hills, and found that the Caledonians were in great strength in the neighbourhood of the junction of the Tay and the Isla, and that reinforcements were continually arriving. Galgacus held the supreme command of the northern Britons. He surpassed all his compeers in valour and descent; and, according to Tacitus, spoke to his army in forcible and glowing terms. He told them that they had to fight for the liberties of all their fellow-countrymen; that the Roman government and their own peace were incompatible. He urged them to fight for their children and dearest kindred; to look back to the glory of their ancestors, and forward to the interests of their posterity. Whereupon chants, din, and shouts were heard. Agricola also addressed his soldiers, and said that they had now reached the eighth year since the conquest of Britain had begun; that they had yet victories to win, and had arms and limbs to enable them to be successful. He also reminded them of their past successes against the Britons, and told them that the coming battle would finish the war. The fight began, and although the Britons fought bravely and skilfully in a hand-to-hand encounter, the Romans were victorious; and, after suffering great loss, the Britons fled, and fell into the greatest despair. Of 30,000 armed men, the Britons lost 10,000. This was the last and most important act of Agricola in Britain, for he was soon afterwards recalled to Rome. The battle virtually decided the fate of the British

nations, and made the Romans masters of the whole island. Henceforth many of the tribes lost their distinctive names, and were merged into Romans.

22. *The Picts or Caledonians*.—I do not intend to enter into minute detail as to the ethnology of the various tribes which inhabited Scotland in the time of Agricola. I shall only here add that Ptolemy has preserved the names of two tribes as the inhabitants of Scotland to the north of the Brigantes. Of these the most important, on the north of the Forth, were the Caledonians, who occupied the wild forest country between Perth and Inverness. They, with the exception of the Scots from Ireland, and the northern tribes from Norway and Denmark, all of whom invaded Scotland at a subsequent period, supplied the most important element in the development of Scottish history. To obtain the best idea of our ancestors before the Roman conquest, we ought to compare them with the septs or clans in Ireland, or in the Highlands of Scotland, in the 12th or 13th centuries, when each chief had an independent sovereign authority over his own clan, and when many dialects of the same language were spoken in contiguous districts. Whatever the origin of the several races inhabiting the north of Britain, and probably there were Celts and Teutons in the same regions, the Caledonians became, during the conquest of the lowland tribes, synonymous with all the tribes to the north of the Brigantes, and with all who refused to acknowledge the supremacy of Rome.

23. *Hadrian's Wall*.—In 120 Hadrian's Wall, from the Solway to the Tyne, was erected in order to

defend the provincials from the predatory warfare and frequent incursions of the Caledonians. In 139 a Roman wall or earthen rampart, between the Firths of Forth and Clyde, was erected by Lollius Urbicus, who was made prætor by Antoninus Pius; and, by this means, the territory between these Firths was added to the Roman possessions. After the end of the 2nd century, Roman authors, in referring to the British people, mean the Caledonian tribes of the north, and speak of the rest of the inhabitants as Romans or serfs.

24. *The Mæatæ*.—About 201 A.D., a new tribe comes into notice for the first time. Dio says that the two greatest northern tribes of the Britons were the Caledonians and the Mæatæ; that all were merged into these two; and that the latter were settled down close to the Antonine wall, and the Caledonians beyond them. Of the nationality of the Mæatæ nothing is known. He also informs us that, like the Caledonians, they were wild, rude, and uncultivated; enjoyed democratic institutions; and could endure hunger, thirst, and other hardships; and that, with the Caledonians, they made frequent incursions against the southern inhabitants.

25. *The campaign of Severus*.—The next important factor in our northern civilization was the expedition of the Emperor Severus in 208. From our present point of view, this expedition, effecting nothing except the making of the bridges and roads which were constructed on the march, and which remained for many centuries, could not fail to be of the greatest use to the Britons after the Romans had left the island.

26. *The first colony of the Irish or Scots expelled*.—Nearly a century passed before any other event requires

to be mentioned. This incident had most important results in the course of time; for it ended in a body of invaders from Ireland giving their name to the northern part of Britain. According to Bede's tradition, the Dalriadic colony, under Reuda, crossed from Ireland (284 A.D.) to the wilds of Lorn and Kintore, and laid the foundation of the Dalriadic kingdom. This colony was temporarily expelled from Scotland; but nothing is more certain than that henceforth we lose sight of the Caledonians and the Mæataë, and that the Picts and the Scots, along with the Attacots, take their place.

27. *The Saxons invade Britain.*—About the year 353 the Picts and the Scots joined the Saxons, who came from the River Elbe, in their incursions into England, and ravaged the south of Britain. Whereupon the Emperor Julian sent a magister armorum to repel the invaders, and peace was restored.

28. *Later events to the breaking up of the Roman province.*—Except that the Roman province was grievously harassed by the Picts and the Scots and the Attacots from the north, and by the Saxons from the sea, nothing is known as to the condition of Britain during the reign of the Emperor Julian (361-363 A.D.) The incursions into the Roman province did not meet with much resistance till the reign of the Emperor Valentinian, who gave up the Eastern provinces to his brother Valens, and devoted himself to the restoration of peace and order in the West. In 368 the Count of the Saxon coast was defeated and slain, and the Duke of Britain fell into an ambuscade. Seeing the grave state of affairs in Britain, Valentinian sent Theodosius to take

the command of the Roman forces there. On his arrival, says Ammianus Marcellinus, he found that the Picts, who were then divided into two great tribes under the name of the Dicalidones and the Vecturiones, had joined the Scots and the fierce Attacots, and were plundering the country round about Augusta (London). Theodosius at once attacked his opponents, defeated them with great slaughter, and restored great part of the booty which had been seized by the Picts and their allies. He then issued a proclamation in which he offered pardon to all who returned to their allegiance, and many accepted his offer. Reinforcements arrived at the Roman camp, and Theodosius, who was an able and brave soldier, reduced various tribes to obedience, restored order and peace to the province, took the territory between the Hadrian and Antonine walls from the Picts, who had for sometime previously held it in undisturbed possession, and gave it the name of Valentia. He also repaired the Roman forts and garrisons, and enabled the province to enjoy the blessings of peace for many years. He left Britain in 369, and was accompanied to the place of embarkation by grateful crowds of provincials. After this there is nothing to relate as to the history of Britain, except reiterated attacks by the Scots, the Picts, and the Saxons, and frequent revolts by the turbulent and arrogant Roman soldiery in Britain. The Roman Empire was at last struck with an incurable disorganisation from within, and by overwhelming forces from without; and the Roman legions were withdrawn from Britain to stem the torrent of invasion near the centre of government. The Romans left Britain A.D. 407.

Lastly, Honorius wrote a letter to the British provincials in 410 (Zozimus VI. c. 10) urging upon them the necessity of undertaking their own defence; and the great Roman Empire in the West was extinguished in 476 by Odoacer, king of the Heruli, by whom the imperial city was taken.

For five centuries from the departure of the Roman forces, Britain was in a continual state of war, and was frequently subjected to the greatest hardships. Before we attempt to consider this period of terrible disorder, let us try to estimate the effects produced upon Britain by the Romans. The greatest results were brought about in the south of Britain; but, more or less, the whole island was improved in the arts of civilization before the departure of the Romans, who left an indelible impress on its future development.

THE RESULTS OF ROMAN CIVILIZATION IN PROVINCIAL BRITAIN.

29. *Agriculture improved, and towns founded.*—Before the departure of the Romans from Britain, great improvement had been made in the art of agriculture; excellent roads had been formed; a large number of flourishing towns and cities and splendid dwelling houses had been built, and richly provided with tessellated pavements and frescoes; and temples, basilicæ, theatres, and amphitheatres had been erected in many parts of the province.

Towns and Cities Romanized.—The towns and cities were centres of industry, refinement, and good government. They were inhabited by the Roman colonists

and the imperial civil and military authorities, by whom the customs and manners of the Romans were practised, the Roman language spoken, and the Roman laws obeyed. Gaul had been completely Romanized ; and although the Romans may have found Celtic the predominant language in Britain, and although the great bulk of the inhabitants may have continued to speak this language, there cannot be any doubt that, had the Romans remained in Britain a little longer, our language, just as most of the languages on the continent, would have been a dialect of new Latin.

The municipal government and privileges of the cities.—The most important element in the government of Britain received its birth from the Romans. This was the establishment of municipal government in the towns and cities. Richard of Cirencester writes that, in the time of the Romans, there were two municipal towns, namely, St. Albans and York ; nine colonies, including London ; twenty cities, and twelve stipendiary towns of less consequence. For all practical purposes, there was no difference between municipal towns and colonies in the later times of the empire, and the inhabitants of both enjoyed the full rights of Roman citizens. The stipendiary towns paid taxes in money instead of a fixed portion of the produce of the soil, as all other unemancipated towns, villages, and districts of the Roman empire had to do. All these towns to which I have referred possessed the “civitas,” and therefore were subject to the Roman law. They had an independent government, which was republican in form, and resembled the ancient constitution of Rome, and they were not subject

to the ordinary jurisdiction of the high state officials of the Empire. Their inhabitants had to defend their own towns, and were exempt from military service elsewhere. Generally speaking, the Roman *municipium*, or town corporation, consisted of the people at large and the *curia*, or governing body. The members of the *curia* were called *curiales*, *securiones*, or senators. The sons of the *curiales* became members of the *curia* by right of birth ; and any freeman might become a member of the *curia* by election. The *curiales* alone had the right of electing the magistrates and officers of the *municipium*. At first these officers were two in number, namely, *duumviri*, or chief magistrates, who had powers entrusted to them similar to those of the consuls at Rome, and their authority extended over the town and its dependent territory. The *duumviri* were chosen from the *curiales*, were obliged to accept office on election, and if they refused to act or concealed themselves they were punished by the confiscation of their property. Next in order, and elected from the *curia*, were the *principales*, who formed the administrators of municipal affairs, and the permanent council of the *curia*. The *duumviri* were chosen for a year, and the *principales* for fifteen years. Nor were the plebeians, who of course formed the great body of the people, forgotten in the Roman municipal scheme of government. They elected the *defensor civitatis*, who was not to be a member of the *curia*, and whose duty was to protect the populace from the injustice and tyranny of the senators. He was a tribune, and in many of the Italian cities became the most powerful member of the community. How closely

the chief magistrate and councillors and the electors of our modern towns corresponded till recent times in their functions to those of ancient Rome need hardly be pointed out.

In addition to these municipal corporations, there were corporations or colleges of the different trades in the municipia ; and the members of these, not being included in the curia, chose patrons amongst the senators or curiales to look after their public and private interests. Here again we find the germ or origin of the various trades or guilds, with their right to have representatives in the municipal curia.

General idea of the supreme provincial government of Britain.—The supreme government of Rome did not greatly influence the subsequent history of Britain. The “Notitia,” which shows the state of things in the fifth century, proves that Britain was divided into five departments, of which four were situated in England and the fifth in the lowlands of Scotland. After the reign of Constantine these departments were governed by presidents or consulares, who had a vicarius placed over them, and who himself was subject to the control of the præfectus prætoris Galliarum. Under these high officials there were various officers engaged in the civil administration of the province ; that is to say, assessors or assistant judges, secretaries, accountants, masters of prisons, notaries, clerks for appeals, serjeants, and others. In like manner the imperial revenues were under a supreme officer in Gaul, entitled Comes sacrarum largitionum ; and under him was the collector for the whole of Britain, the overseer of Augustinian treasures in Britain, and the

procurators of the Cynegia, or hunting establishment. Of a Roman mint for coinage there are traces till the reigns of Diocletian and Maximinian (284 to 305 A.D.) At the period included in the "Notitia," military affairs were subject to the provincial government of Gaul; for the vicarius or governor of Britain had then merely the civil power entrusted to his care. In Britain military affairs were under the Count of the Saxon Shore, "Comes litoris Saxonici;" and the Duke of Britain, "Dux Britanniarum." The Count of Britain, "Comes Britanniarum," was the civil assistant of the Duke of Britain, and had no military authority; and the whole of the Roman forces in Britain were under the command of the Count of the Saxon Shore and the Duke of Britain. As a matter of policy the Romans entrusted the supreme civil and military power as seldom as possible to the same person.

THIRD PERIOD.—CELTIC AND TEUTONIC.

30. *Municipal towns were small republics. Scotland in a wretched condition till the 8th or 9th century.*—The Roman forces and machinery of civil administration having been withdrawn, the British provincials began to rule themselves in their own way. This was not at all difficult; because the cities really governed themselves in the time of the empire, and the imperial power was chiefly fiscal and military. This observation is only strictly true as regards the southern part of this Island; for there are no traces of any cities or

municipal corporations of any importance in what is now Scotland till the 10th century.

During four or five centuries after Britain ceased to be a Roman province, Scotland must have been the scene of horrible bloodshed, anarchy, and confusion. Trade could hardly have existed, agriculture must have been in a very backward state, and a pastoral and warlike life was the common type of society. There happened, however, one great event which was destined more than any other to advance the civilization of the rude and barbarous peoples who dwelt north of the Tweed. This was the introduction of Christianity.

31. *Christianity introduced in the 5th and 6th centuries.*—The Picts and the other Celts in Scotland up to a date much later than the departure of the Romans were Pagan in their national religion, and worshipped many gods. Doubtless the doctrines of the Christian faith were known at an early period in Britain, but the southern Picts, or those on the south of the Grampians, were not converted to Christianity till A.D. 412; nor the Picts of the north till A.D. 565; nor the Strathclyde Britons, whose capital was Dumbarton, and whose territories once comprehended Northumberland and Westmoreland, till about A.D. 580. Moreover, the old Scots, or the Scots who first came from the north of Ireland and settled in Argyle, and who were afterwards driven back to Ireland, were probably Christians before their emigration, and at the latest must have been converted somewhere between 446 and 503 A.D. or while they were driven into exile. From the 6th century, a rude and barbarous Paganism gradually gave

way before the higher truths and morality of Christianity, and the latter long before the reign of Malcolm Canmore had become the national religion. The early Scottish Church was monastic in its character for four centuries, and long carried on its work by the aid of missionaries, who, in the course of time, were spread all over the country, and, in some instances, early settled down among the people. It was independent of the Pope of Rome, had its fountain head at Iona, and afterwards at Dunkeld; and, beyond all doubt, greatly contributed to the civilization of the people by encouraging industry and agriculture, educating the higher classes, and inculcating the principles of truth, morality, and religion in the great body of the people.

THE KINGDOMS OF THE STRATHCLYDE BRITONS, THE PICTS, AND THE SCOTS.

32. *Rome's successors in Scotland.*—On the withdrawal of the Roman army from Britain, the Strathclyde Britons, the Picts, and the Scots obtained the sovereign power in Scotland; and these three ultimately united to form the modern kingdom of Scotland.

THE STRATHCLYDE KINGDOM.

33. *Its history.*—It is not known when the kingdom of the Strathclyde Britons first came into existence. What we do know is, that for one hundred years after the departure of the Romans, there

was an unceasing war between the Scots, Picts, Strathclyde Britons, English, and Danes. Most probably the inhabitants of the Strathclyde kingdom were Celts who had occupied the southern parts of Britain, and had been driven west by the successive invasions of the Saxons and the Picts. At no time does this kingdom appear to have exercised any considerable influence on the progress of events in Scotland. Sometimes the Strathclyde kings acknowledged a kind of subjection to the kings of England, and at other times a scion of the royal Pictish race was seated upon the Strathclyde throne. Early in the 10th century this kingdom was conferred by the king of the Scots on the Tanaist or heir-apparent of the Scottish throne; and in the latter part of it, the Tanaist as king of Cumbria performed homage to Edgar king of England. The *Saxon Chronicle*, A.D. 924, states that the king of Strathclyde revered Edward king of England as his father; and elsewhere it is stated that, even as early as 756, the king of Strathclyde paid homage to the Earl of Northumberland and also to Ungust king of the Picts. The southern part of this kingdom, with the city of Carlisle, ultimately became part of England, and the northern of Scotland.

34. *Its language, manners, customs, and laws.*—The national saint and the language both point to a close connection between the Strathclyde Britons and the Welsh. The language spoken in this region down to very recent times was Celtic or Gaelic, and, I daresay, this tongue may yet be spoken by the natives in some of the outlying districts. Of

course, this latter fact may be explained by the occasional migration of some Highland families, but, as no general migration is known to have taken place, this circumstance would not be sufficient to explain the recent general use of the Gaelic in this region. I therefore infer that their laws, manners, and customs were Celtic; and we already know that they adopted the Christian religion. They had a monarchical form of government, nobles or chieftains, a public assembly for the determination of all matters of national interest, and a Christian priesthood, who had been substituted in place of Druidical priests. The mass of the people were in subjection to the great landlords or chiefs on the basis of clanship.

35. *Possibly the original inhabitants were conquered by the Caledonian Picts about the time of the Saxon invasion.*—A suggestion has been made, and been accepted by some, that, while the Angles were establishing themselves in Bernicia and Deira, the Caledonian Picts obtained possession of the western side of Lancashire, and there founded a kingdom. It was called by the Scots the kingdom of Strathclyde, because its northern extremity was on the Clyde. How far this is based on fact, I am at a loss to say. I think, however, that there is a good deal to support the hypothesis; for, on the breaking up of the Roman empire, the Caledonian Picts were menacing, attacking, and often devastating this part of the country, and at a later period the sons of the royal house of the Picts were sometimes elected kings of Strathclyde. Against this view I do not consider the Celtic tongue of the Strathclyde Britons as any objection; because the speech of a conquered

people is often far more enduring than anything else in their history, and frequently survives the language of their conquerors.

THE KINGDOM OF THE DALRIAD SCOTS, OR IRISH.

36. *The Dalriad Scots arrive in Scotland.*—In A.D. 258, as already stated, a colony of Scots from Ireland settled in Argyleshire and the adjacent islands. Reuda was the name of their leader, and after him they were called Dalreudini. This first colony retreated to Ireland about 440, and a new colony was established in Argyleshire and the neighbourhood under the three sons of Erc in 503, and their territory, which was barren and mountainous, was called Dalriada. The Irish list of the kings of Dalriada makes Loarn the first king, and his brother Fergus his successor; but the Scottish list makes Fergus and Loarn reign together, the latter in the north, and the former in the south, and calls Fergus the first king of the whole of Dalriada, which, as a separate kingdom (503-843), never exceeded the limits of the present county of Argyle.

37. *Aidan's homage to the kings of Ulster released.*—Aidan, son of Galbran, reigned 24 years (575-599). He was the most celebrated of the Dalriadic kings. He is called by Bede "rex Scottorum in Britannia" (603), and, in the Albanic Duan, "king of the extended territories." Certainly he did extend his kingdom more than any of his predecessors or his successors,

until Kenneth ascended the Pictish throne. As the evidence of his supremacy he received holy unction from St. Columba at his coronation. In 590 Aidan was present at the famous Council at Drumkeat in Ulster. This Council was composed of the kings, peers, and clergy, summoned by Aid king of Ireland, and is mentioned by Adamnan. At this council Aidan procured the remission of all homage due by the kings of Dalriada to the kings of Ireland. Hitherto he was a "regulus" or subordinate king, but henceforth, so far as Ireland was concerned, he and his successors were to be free and independent rulers over their own people. He suffered a great defeat at the hands of Adelfrid king of Northumbria; and Bede says that thenceforth no king of the Scots had dared to fight with the king of the Angles to his day (703).

38. *Some incidents as to subsequent Dalriadic kings.*—Donald Brec, son of Eocha-Bruidhe, reigned twelve years, and was slain in 642 by Hoan king of the South Britons at Fraith Cairn. Adamnan says that Donald Brec, the grandson of Aidan, was defeated at Rath (Moy-Rath) by Dumnail, grandson of Amurec. This latter battle was fought in Ireland, and was brought about by the murder of a king of Ireland by Congal Claon king of Ullah. Donald Brec was Congal's ally. He was also defeated at several other places, and particularly at Glen Mureson in 638. Donald was singularly unfortunate, and his reign was as calamitous as Aidan's had been full of glory.

The last of the line of Fergus was Malduin, who reigned fifteen years (665-680). His successor was Fercer II., who reigned twenty-one years (682-703).

The two royal houses of Loarn and Fergus fought against each other with the greatest bitterness, and sometimes the one and sometimes the other occupied the throne. At last both families were exterminated, and a stranger took their place on the Dalriadic throne. This occurred in the middle of the 8th century, at which time the Dalriadic kingdom under the old Irish royal family comes to an end.

39. *Frequent quarrels and slaughters for the Dalriadic kingdom.*—According to one list, called the Latin, there were twenty-four Dalriadic kings from 503 to 843; but the *Albanic Duan*, written in the reign of Malcolm III. (1050-1093), enumerates thirty-four. Their biographies, of which I have given some extracts, are not at all interesting. They are little more than the repetitions of quarrels and slaughters of the heirs of Fergus and Loarn for the supreme power, and occasional contests between them and their neighbours. Even although they were reliable they have no great bearing on our subject; for modern Scottish civilization and constitutional and legal progress are not derived from Celtic but Teutonic sources, and the Dalriadic kingdom had no great influence on the subsequent history of Scotland. As to the early religious development of our country, this was mainly Irish; for the early Scottish Church was derived from Ireland, and for several centuries was essentially based on the Irish model.

40. *The Dalriadic kingdom elective, and adopted the law of tanistry.*—From what has been said as to the events of Aidan's reign, it is clear that till 560 the so-called kings of Dalriada were nothing more than the

chiefs or leaders of a small colony of Irish who had settled in and about Argyleshire, subordinate to the kings of Ulster. After that date the chiefs of Dalriada were invested with sovereign power, and, so far as can be ascertained, the kingdom was hereditary, and brothers were preferred to sons in the succession to the throne. It is well known that the chief monarchy, whence the Dalriads were an offshoot, was elective, and O'Connor says that this principle also applied to Dalriada. The Scoto-Irish seem, in fact, to have adopted the same form of government as existed in the parent state at their departure from Ireland. There was only one sovereign, and yet there were continual disorder, civil war, and assassination. "The Dlighe tanaiste," or law of tanistry, would appear to have been followed in Dalriada, as in Ireland, both in the election of kings and of chieftains, and this law rather increased than diminished the disorders which arose in Dalriada; for the rule of succession to the throne caused many rivals to contend with each other for the royal sceptre. The tanist, or heir presumptive, commanded the army in the reign of the sovereign, and succeeded to the throne on his demise.

41. *Their judges and punishments.* — Tradition supplied the place of written laws, and the administration of justice was entrusted to Brehons or judges. In Brehon law, compensation was called Eric; that is to say, not only reparation, but a fine, ransom, or forfeit. Amongst the inhabitants of Alban and around Drumalban, and called the Albanian Scots, this fine was called "ero," and a scale of offences as

recognised by them is to be found in the *Regiam Majestatem*. A minute catalogue is there given of offences against the person, from the king down to his lowest subject, including murder as well as the breaking of a bone or a finger. The office of Brehon was hereditary, and a piece of arable land was annexed to it. When performing his judicial duties the Brehon sat on a hillock, or heap of stones, or turf, or in the middle of a bridge, and the litigants themselves pleaded their causes before him. This sitting in the open air in the administration of justice was practised by the Druids, and in the "Tings" or Courts of the Scandinavians, in their legislative and judicial assemblies; by the early Romans in the senate; and by the Athenians in the Ecclesia. For a great length of time the baron-bailee, who was the Brehon's successor, dispensed justice amongst the Scoto-Irish on a moot hill, or eminence, and generally on the bank of a river and near a sacred edifice.

42. *Their marriages*.—When the Dalriadic kingdom was established by the second colony of Scoto-Irish, Christianity had made considerable progress amongst their brethren in Ireland, and therefore polygamy must have been rare amongst the poorer colonists. How far their chiefs and great men had adopted monogamy, I cannot say. Amongst the Dalriads presents or dowries were given to husbands on their marriage; and, in this particular, they differed from the Picts.

THE CALEDONIAN OR PICTISH KINGDOM.

43. *Extent of the Pictish territories from the Christian era till the Picts and Scots combined.*— Tacitus tells us that the Caledonians held all Britain north of the Tay; Ptolemy gives Loch Fyne as their western boundary; and Dio gives the Antonine Wall as the boundary between the Roman provincials and the Mæatae. About A.D. 170 the Caledonians broke in upon the Vespasian province, and seized all the land to the Firth of Forth. Bede gives the Clyde as the Caledonian boundary line, and says that the Dalriadic kingdom had been incorporated into Pictland. He wrote his history in 732.

In 425 or 426, according to Gildas and Bede, the Picts seized the whole province of Valentia up to the wall of Gallio between the Solway and the Tyne. Gildas, who wrote about 560, adds that in 446 the Britons attacked the invaders without success, and that the Picts remained in their new possessions. The truth is that the Picts took, and for a century held, all the territory from the Tyne to the Humber (448 to 547), and for a century and more almost exclusively occupied this region, and then retained the half of it in all time thereafter. From 685 to 793 the Tweed was the boundary between the Picts and the Angles; and in the latter year the Danes invaded Northumbria, where they caused great confusion. The result was that the Picts of Galloway took Wigton, Kirkcudbright, and parts of present Galloway; and the Picts of the east of Scotland seized on Roxburgh and Dumfries.

44. *The Hebridian monarchy.*—The Hebridian monarchy was founded about 28 B.C., and about 300 A.D. comprehended the Decaledones, *i.e.* the Picts on the north of the Grampian mountains. Up to this latter date the Vecturiones, or southern Picts, had a democratic government, but the Hebridian king extended his sway over the latter about A.D. 430. King Drust is said to have succeeded to the throne of the Picts in 414, and it is certain that Brudi was king of all the Picts in 568. From the commencement of the Hebridian monarchy till 414 may be called the poetical or legendary period, and comprehends the reigns of thirty-six kings. The historical period begins with King Drust the Great.

45. *The history of the Pictish monarchy.*—Drust the Great was the thirty-seventh king of the Picts, and reigned thirty-eight years (414-452). He is said to have fought one hundred battles. Although the number is no doubt exaggerated, yet his battles with the southern Picts must have been frequent and bloody. In his reign, or immediately before it, Christianity was introduced amongst the southern Picts.

Nethan was the thirty-ninth king, and reigned twenty-five years (456-481). The *Pictish Chronicle* calls him the Great King of all the Picts. From Nethan to Brudi II., the forty-ninth king, there is a barren list of kings.

Brudi II. son of Meilochon reigned thirty-one years (557-581). In the ninth year of his reign he himself together with most of the northern Picts was converted to Christianity by St. Columba. Forteviot

was in his reign the residence of the Pictish kings, and "Fortren" is often used for Pictland. Till Nethan III. the sixty-second king nothing is worth relating here; for the chronicles contain nothing beyond the names and the deaths of kings, and the invariable slaughters which characterised this epoch of European history.

Nethan III. reigned fifteen years (712-727). In 718 the monks of Iona were expelled beyond Drumalban by Nethan; and Cosmo Innes conjectures that this event arose from a dispute as to the proper day for the celebration of Easter.

Drust VII. and Elpin I. succeeded Nethan III. and reigned together five years (727-732). All that need be said about their reign is, that numerous battles arising out of the elections to the monarchy were fought. Indeed, it would appear that usurpations were frequent in the Pictish kingdom, and that these disputes as to the succession to the throne were often fomented by the Dalriads.

Ungust I. the son of Vergust reigned twenty-nine years (732-761). If we except Drust the Great, he was the most valiant and powerful of the Pictish monarchs, and his reign was full of enterprise and glory. Though cruel when tried by a modern standard, he was no more bloodthirsty than the victorious kings of the age in which he lived. In 744 he fought a great battle with the Strathclyde Britons; and in 756 Edbert king of Northumbria having joined his army to Ungust's, Alclud the capital of Strathclyde was surrendered on what would appear to be terms of homage. Ungust I. defeated the Dalriads on several occasions. Thus in 739 he ravaged their territory,

and put in chains Dungal and Ferach the two sons of Selvac the late king of Dalriada ; and in 743 a battle was fought between the Picts and the Dalriads, in which the latter were utterly defeated. From this date the race of the old Dalriadic kings comes to an end, and the Pictish royal house takes their place in Dalriada in some kind of subordination to the Pictish throne.

46. *The old Dalriadic kingdom destroyed by Ungust king of the Picts, and the Picts and the Scots united by Kenneth the son of Alpin.*—Murdac the son of Ambkellach began his reign of three years in 736. In 739 the Dalriadic kingdom was totally destroyed by Ungust, son of Vergust, king of the Picts ; and Ungust wasted the whole of Dalriada. Sometime afterwards Talorgan the brother of Ungust routed Murdac, and slew many of his followers ; and in 743 Ungust again ravaged Dalriada. After this latter date the history of Dalriada ceases in Tighernac and the *Annals of Ulster*.

What really took place at this time as to the Dalriadic throne is hidden in impenetrable darkness, and the history for a whole century is almost unknown. Aod-Fin was made king in 739, but who he was, or by whom he was placed on the throne, or for what reasons, we are absolutely ignorant. The most probable solution of the difficulty involves a complete rejection of the old popular theory of the total destruction of the Picts, or even of their nobles. From the *Annals of Ulster* it is clear that till 811 there were petty kings of Argyle, and that Kenneth, who was the son of Alpin, and also the king of

the Scots, ascended the Pictish throne in 843; and that, in noticing the death of Kenneth in 857, both Tighernac and Carodoc of Llancon refer to him merely as "the king of the Picts." Kenneth's earlier and smaller kingdom in fact becomes merged in the larger and later title. This was quite natural, and is what is now supposed to have taken place as to four or five of the Dalriadic princes whose names appear in the lists of the kings of the Picts, and whose reigns belong to periods nearly coincident with the reigns of the kings of Pictland. The name of Kenneth's paternal grandfather is unknown; but Kenneth himself claimed the Pictish throne through his mother. Probably he succeeded to the throne in consequence of the internal dissensions, and he may in point of fact have been the nearest heir of the Pictish kingdom.

From the accession of Kenneth to the Pictish throne, the tendency to an hereditary kingdom becomes more and more decided, and of course would be strengthened by the union of the two crowns.

47. *Character of the Pictish kingdom.* — The monarchy was elective, and the kings were chosen from a royal race. Dio, lib. 76, says that the government was almost democratic, and there can be no doubt whatever that the Pictish kings were elected by the people, and were often deposed, and even sacrificed, by their subjects. It would also appear that brothers succeeded brothers, and not sons fathers. When there were two princes who appeared to have equal claims to the throne, we are told by Bede that the one who was descended from the female line was

preferred on the ground of his having better blood ; but notwithstanding this preference of males descended from females of the royal family there is not a single instance of a woman reigning in Scotland till after the disputed succession, when the rules of primogeniture and lineal succession by descent were firmly established in Europe. Adamnan states (II. 14) that the Pictish kings had a senate, and (II. 11) that the Picts had a race of nobles. Briefly then, the government of the Picts in Scotland, like all early governments, was a democratic monarchy, and the early kings chosen from a peculiar family were men of superior merit, rich in friends, retainers, lands, cattle, and slaves, and were little more than chiefs, like those in America in modern times. As every man had a voice in the general assembly of the tribe in the woods of Germany, and indeed everywhere in the early stages of society amongst freemen, so it was in the earliest and rudest times in Scotland. "De minoribus," says Tacitus in his *Germania*, "principes consultant; de majoribus omnes."

48. *Marriage of the Picts*.—What Cæsar says as to the southern Britons, Dio tells us of the Picts, namely, that they had wives in common. This, Montesquieu says, is a feature of pastoral society. Amongst the Picts there was no sacred ceremony in the celebration of marriage. When they wished to marry they made presents to their intended bride's father or guardian, and when the marriage was to be consummated the bride made a present to her future spouse. Thereafter the parties themselves and their friends met together, and the father solemnly delivered

the bride to the bridegroom, and then there was a marriage feast.

FOURTH PERIOD.—THE SCOTO-PICTISH KINGDOM (843-1056).

49. *Verge of authentic Scottish history reached.*—During this period the darkness which enveloped Scotland for five centuries becomes less dense, and the dawn of our authentic national history is at last reached. In our next epoch we shall be able to avail ourselves of reliable materials; but as yet we must grope along as best we can in the midst of a flickering twilight. I therefore propose to finish this epoch (1.) with a brief sketch of the lives of the early Scoto-Pictish monarchs; and (2.) with some remarks on our early annals.

50. *Sketch of the early Scoto-Pictish kings.*—Kenneth III. reigned in Pictland for sixteen years (843-860). He was a man of considerable talents, and had ruled in Dalriada for two years before he ascended the Pictish throne. In 849 he transported the relics of St. Columba from Iona to Dunkeld. He invaded England, and burned Dunbar and Melrose which had been seized by the English, or the Danes of Northumbria. On the other hand the Britons of Strathclyde burned Dunblane, and the Danes devastated Pictland to Cluny and Dunkeld. He died in his palace of Forthunir-tabacht near the river Earn, south of Perth. This palace was the chief residence of the Pictish kings after the recovery of Lothian in 684. Before that time, as we may learn from Adamnan,

they resided at Inverness. This king and all his successors, till Edgar's death in 1098, were buried at Iona, which was the royal burying place till Dunfermline was founded by Malcolm Canmore and his queen St. Margaret in 1070-1093.

Donald I. succeeded his brother Kenneth III. and reigned one year. His reign is important from a statement in the *Pictish Chronicle* that he confirmed the old laws which had been granted by Aod-Fin to the Dalriads. What these laws were is not exactly known, but it has been plausibly conjectured that they were the Brehon or old Irish laws.

Constantine II. the son of Malcolm III. was the next king, and reigned twenty years, or, as some say, sixteen (864-884). In 866 Olave the leader of the Danes and Norwegians in Ireland ravaged Pictland, and carried away hostages and plunder; but having returned a few years later he was slain in battle. The Norsemen afterwards (874) invaded Pictland, defeated the Picts with great slaughter, and remained a year in their country. This reign was very disastrous to Scotland; and the Picts seem to have been enervated by the long peace which they had enjoyed, and consequently were unable to contend with the hardy Danes, who were inured to arms and perpetual war. Not only were the Picts defeated in battle by the Danes, but they suffered great territorial losses at the hands of the invaders. Indeed, somewhere between 864 and 882 the Norwegians had seized Orkney, the Hebrides, the shires of Sutherland and Caithness, and part of Ross-shire, or in other words about a fourth of the Pictish kingdom. This

was the result of many battles between the Norwegians and the Picts.

Constantine III. the son of Ardh reigned forty years (904-944). The *Chronicle of the Picts* informs us that the king and Kellach the bishop, along with the Scots, swore that the laws and discipline of the faith, and the laws of the Church and evangelists, would be upheld. This compact was entered into on the Hill of Faith near Scone in 909, and was made, no doubt, in consequence of the differences between the Church of Rome and the Church of Scotland on various points of Church doctrine and practice. In 906 the Danes ravaged the kingdom. About 921 the Norwegians and the Danes of Ireland invaded North Britain with a great army. Constantine made an alliance with the North Saxons or Northumbrians, and at "Tinmore" gained a great victory over the invading hosts, whose leader was called Reginald. Three of the divisions of the enemy's army were defeated with great slaughter, and the fourth under Reginald escaped and returned to Ireland. In 937 the great battle of Brunanburg was fought. Athelstane had invaded Scotland by land and sea, and having ravaged the country retired. Constantine then formed a confederacy with Aulaf king of Ireland, the Norwegian prince of the Hebrides, Eugenius king of Cumberland, and many petty Norwegian and Danish kinglets. The object of this confederation was to invade the territories of Athelstane; but the design was frustrated by the English monarch, the allies were repulsed with great slaughter, and five kinglets and many celebrated chiefs fell in the battle. In his old

age Constantine resigned his kingdom, retired to the monastery of St. Andrews in 944, and died in 954.

Malcolm I. son of Donald II. reigned nine years (944-953). The *Saxon Chronicle* states that in 945 Edmund king of England, having conquered Cumberland from the Britons, gave it to Malcolm on condition that he would do homage for it, and defend the north of England from the Danes, who were now regarded as the common enemies of both Scotch and English; and war between the latter peoples thenceforth ceased for half a century.

Kenneth IV. the son of Malcolm I. reigned twenty-two years (970-992). He made war on the Strathclyde Britons, whose kingdom after this king's reign disappears from history. With this king the *Pictish Chronicle* ends.

Malcolm II. the son of Kenneth reigned thirty years (1001-1031). It was in this king's reign that the feudal or military division of all the land in Scotland is absurdly said to have been effected. The *Saxon Chronicle* (1031) says that Canute king of England and Denmark entered Scotland, and Malcolm and Mulbeth and Temarc became his subjects. This is one of the grounds for the assertion that Scotland was subjected to English dominion. Much fighting took place between the Danes and the Scots on the north of the Tay, and the former appear to have sustained terrible losses about the middle of the reign of Malcolm II. The general result of the wars of this period saved the kingdom of Scotland from being made a dependency of Denmark.

Macbeth reigned seventeen years (1037-1054), and was an able and beneficent king. He was slain at Lumphanan by Macduff for his cruelties upon the latter's wife and children.

51. *The history of Scotland clear after 1056.*—Malcolm III. ascended the throne in 1056, and as Scottish history is henceforth clear, I will now make the proposed observations on this period, and close the first epoch of our subject.

OBSERVATIONS ON THE SCOTO-PICTISH MONARCHY.

52. *The kings were elective.*—The list of the kings of the Scoto-Pictish kingdom during the period just concluded proves that the monarchy was elective, as, indeed, was the case throughout Europe in this age. Hereditary succession to the throne was not established in Scotland till the death of Macbeth, and its exact rules were not determined in Europe till Edward I. give his decision on the claims of the competitors to the Scottish throne in 1292. For the support of the royal dignity the king had chiefly to depend on the revenues of his own private estates. In this period, however, there is a distinct recognition of the right of the king and his court to be maintained by the great landowners when the monarch was travelling through the country.

53. *The Scoto-Pictish kingdom virtually governed by great chiefs.*—Coincident with the union of the Scots and the Picts, and the extension of the Pictish kingdom, the national council or senate

must have been gradually approaching the form which it took in the epoch which we will consider in the next lecture. How it was then composed, and what it did at first, we have no direct information; but its duties and its members may yet be determined with no inconsiderable degree of accuracy. The chiefs of the clans or tribes by whom Scotland was then held were its members, who gave advice to the king as to matters involving peace or war, and acted as a royal council in all disputes referred to them by the king. In the age with which we are dealing legal proceedings are rare, and were carried on before the local chiefs in their own halls, or before the church dignitaries or their deputies; and only in cases of great hardship would the king or his council be troubled with complaints against injustice and oppression. Nay more; the chief of a tribe was as independent in his own territory as the king in his patrimonial estates, and would not allow an interference with what he considered his undoubted and sovereign rights. In short, at the time under review, Scotland was ruled by a large number of petty chiefs or heads of families; by a few territorial magnates, whose wealth consisted in large herds of sheep and cattle, and who were surrounded by a large number of kinsmen, ready at all times to do their behests; and by one supreme chief who was elected by the powerful men in the state in consequence of his royal birth, his wealth, the number of his followers, and his ability to command the national armies. With such an un-

settled and rude state of society as existed in Scotland from the departure of the Romans from Britain till the eleventh century, settled rules of succession to the throne or even to individual property are impossible. The whole framework of the commonwealth was based on force. Against those who were disobedient or traitors to the constituted authority, the only effective means of punishment was the judgment of fire and sword, by which the offender's estates were wasted by a powerful neighbour, who frequently received from the king a share of the devastated property as a reward for his services.

54.—*The primitive population modified by invasions from the North.*—The great employment of the people in those days was war, and invasions were being constantly made into Scotland by the Scandinavians of the North. These hostile incursions deprived the Scoto-Pictish king of a large portion of his territory, and brought about considerable modifications in the population of the eastern parts of Scotland, and, in fact, of the whole country. The Scandinavian rulers in the North were as independent in the districts they acquired as the king of the Picts in his; and in 920 Sigurd added Caithness, Sutherland, and part of Ross to his earldom of Orkney, and this earldom was even further extended southwards at a later period under Thorfinn. On Thorfinn's death (1074) the Norwegian supremacy received a severe shock, and his successors, one by one, had to submit to the king of the Picts. Maormor was long the title of the great chieftains of the North, and we have even Maormors of Angus, Argyle, and Moray. The name or title seems to be equivalent to

the Saxon "Thane" or Scandinavian "Jarl." The Maormor of Angus was not reduced to subjection to the Scottish kings till the reign of Kenneth IV.

55. *The Christian Church: Its wealth and contributions to the national civilization.*—The father of king Duncan, who reigned from 1031 to 1037, was the son of Crinan the abbot of Dunkeld, who was married to Bethoc the daughter of Malcolm II. This marriage between the king's daughter and an abbot has given rise to much misapprehension in the minds of those who are not aware of the high position which ecclesiastics had already attained in the state, and that, till the decree of Pope Gregory III. (1074), all the clergy might marry, and that monks were allowed to marry till the Council of Rheims in 1148. By the eleventh century the Church of Scotland had become richly endowed by the generosity of its members, and the brothers and sons of kings eagerly sought the great benefices which were at her disposal. Some abbacies were richer than bishoprics, and in dignity mitred abbots were the equals of the bishops. Whatever may be said in condemnation of the corruption and venality of the Church at a subsequent period, it is nothing more than justice to state that the higher clergy of this period throughout Europe were the scholars, statesmen, and most enlightened landlords of the age.

56. *Tenure of land in Scotland anciently tribal.*—Amongst the ancient Germans the arable land belonged to the tribe and not to the individual, and amongst the ancient inhabitants of this country the same rule applied. The pasture lands, as was almost

within recent times the case in the Highlands of Scotland, were common to the people in the district; and individuals were wealthy in proportion to their flocks and herds. Istand Landnamabok gives some interesting particulars concerning the settlement of a barbaric colony among the Norwegians of the ninth century, thus supplying an account of what must have been true as to the people in Scotland at the same time. He says that the people of this colony had flocks of sheep and swine on the mountains, and kept a few horses and cattle near their houses. Many were rich; the poor were industrious; and all were equal in the national council. The rich had summer and winter residences, the former on the hills and the latter sheltered in glens. These houses of the great became the centres of little towns, which, in the course of time, rose to great and important cities.

57. *Name of Scotland not applied as now till 1020.*—The modern names of Scotland and Scotchmen for the north of Britain and its inhabitants were unknown until about the year 1020. They were applied by the later Celtic writers to the Picts and their country, and not to the old British Scots of Bede. These British Scots had for several centuries been called Gatheli and Heberneses. None of the inhabitants of Scotland were known as Scots from 740 to 1020; and the alleged conquests of the Picts by the Dalriads is a delusion of the Irish monks of the eleventh century, unsupported by any credible authority. The *Pictish Chronicle* ends in 992, or a century and a half after the supposed conquest, and the exact words used by this authority are these:

“Victoria autem a Pictis est nominata quos, ut diximus, Kinadius delevit.” This refers to an account which does not now exist, and taken plainly and without reference to a supposed fact need not be translated with a stronger meaning than this, namely, that Kenneth put an end to the Pictish kingdom as it had hitherto existed. Besides, cotemporary authors give no support to the alleged conquest, *e.g.* Nennius, King Alfred, Asser, and Tighernac. I do not think that the native language spoken by Kenneth Macalpin affects the question here discussed; because a king’s mother tongue need not be the same as his people’s. Moreover, the Picts referred to by the English authorities of the twelfth century are most probably a body of Pictish colonists who had taken up their abode in Galloway. Down to the twelfth century the lords of Galloway were only feudatories, and really independent of the kings of Scotland.

58. *Summary.*—By way of introduction to the lectures which are to follow, I have told you from the most reliable sources what we know of our primitive ancestors; indicated the general results of the Roman invasion into Scotland; described the state of affairs which happened after the departure of the Romans to the dawn of our authentic history; and pointed out the various steps by which modern Scotland was formed into one independent and powerful kingdom. We find that great rudeness and barbarity existed amongst our ancestors till the end of the epoch which we have been considering; that Roman law and civilization had not, directly, been very powerful in influencing our laws and legal institutions; and that the manners

and customs, and also the Christian notions of religion and morality, of the great body of the people were Celtic.

LECTURE II.

FROM THE INTRODUCTION TILL THE DECLINE OF FEUDALISM

(1057-1406).

SECOND EPOCH.—NORMAN-SCOTTISH.

OUTLINE OF THE GREAT HISTORICAL EVENTS DURING THE EPOCH.

59. *Results of Norman Conquest for Scotland.*—Malcolm III. succeeded to the throne in 1057, and, having reigned twenty-seven years, fell, during the reign of William Rufus, in a skirmish before Alnwick Castle in Northumberland (1084). In his reign William the Conqueror invaded England, and was crowned in 1066; and the feudal laws of Normandy were soon afterwards introduced into England. The Norman Conquest produced important results for Scotland: (1.) It drove the Saxon princes from England into this country, and caused Malcolm to take up arms against William in an attempt to restore the Atheling, his brother-in-law, to his English possessions. Malcolm was defeated, agreed to give hostages, and do homage for his own territories in England. (2.) It brought a large number of Saxon refugees from the English to the Scottish court, and gave rise to much discontent in Scotland in consequence of their receiving grants of

land from Malcolm. (3.) Intercourse with the cultivated Normans raised the standard of civilization and refinement in Scotland.

60. *Reign of David I.*—David I. reigned twenty-nine years (1124-1153). He was defeated by the English in the battle of the Standard in 1138, and the war was ended in the following year by his being left in possession of Northumberland, Cumberland, and Westmoreland. David greatly promoted the civilization of his country by founding religious houses, which were then the chief seats of learning and the liberal arts in Scotland and the centres of industrial and agricultural activity.

61. *William I. did homage to Henry II.*—William I. the Lion succeeded to the throne in 1165, and reigned forty-nine years (1165-1214). In 1178 arose a dispute with the Pope in regard to the nomination of a bishop to the vacant see of St. Andrews. The Chapter elected a distinguished Englishman, and was supported by the Pope in its nomination; but the king, whose nominee ultimately succeeded to the bishopric, appointed his own chaplain to the vacancy. His wars with the king of England were less fortunate than his disputes with the clergy; for, having made a vain attempt to get restitution of Northumberland from Henry II., he invaded that province. He was made prisoner, and compelled, as the price of his release, to do homage to the king of England for his whole kingdom. Richard I. renounced this right for 10,000 marks.

62. *Alexander III. defeated king Haco: the Hebrides and Man ceded to Scotland.*—Alexander III.

reigned thirty-seven years (1249-1286). The early years of his reign were a series of struggles between adverse factions, which contended for the regency. In 1263 Haco king of Norway invaded Scotland. After punishing the earl of Ross and other chieftains for their savage excesses in the Western Isles, which were then under the dominion of Norway, and compelling the Orkneys and adjacent mainland to pay tribute, the king of Norway anchored the greater part of his fleet in the Clyde. Having lost many ships in a tempest, he landed a strong force near Largs, and was attacked and defeated with great slaughter by the Scots. A peace was afterwards concluded between Norway and Scotland, and the sovereignty of the Hebrides and the Isle of Man was ceded by the former to the latter kingdom. Alexander's daughter Margaret was married to Eric king of Norway, and dying in 1283 she left an infant daughter, the Maid of Norway. Alexander's death in 1286 made this princess the direct heir to the Scottish throne. A regent was appointed, and amidst plots and counter-plots the Maid of Norway died on her way from Norway to Scotland; and the country was obliged to undergo the miseries attending a competition for the crown amongst rivals, who were ready to sacrifice the honour and glory of the country in order to realize their own schemes of ambition.

63. *The disputed succession referred to Edward I.*
—To prevent a long and fierce controversy, the estates of Scotland asked and obtained the advice and mediation of Edward I. The competitors appeared before the English king, and all, with the exception of

Baliol, Bruce, and Hastings, withdrew their pretensions.

The legal contest merged into these two questions: (1.) Was the crown of Scotland divisible amongst co-heiresses and their descendants? and (2.) Ought the descendants of an elder daughter to succeed before those of a younger? Baliol was the grandson of the elder daughter of David I., and Bruce and Hastings were the sons of his younger daughter. A commission of a hundred and four persons, named by Edward I., Baliol, and Bruce, was appointed to examine the claims of the competitors, and report to the English king. Soon afterwards the regents of Scotland surrendered the kingdom into Edward's hands, and the English king came to Scotland and compelled persons of all ranks to sign the rolls of homage.

64. *His decision in favour of Baliol, without prejudice to his rights as Lord Paramount.*—The final judgment was given on 17th November 1292, when Edward in the great hall of Berwick Castle decided that "John Baliol should have seizin of the kingdom of Scotland," and protested that the judgment he had thus given should not impair "his claim to the property of Scotland." On the 19th, the great seal of the regency was broken, and the fragments were deposited in the Treasury of England, "in testimony to future ages of England's superiority over Scotland." Baliol the next day swore fealty to Edward at Norham, and on the 30th was solemnly crowned at Scone, and before the end of the year did homage for his kingdom at Newcastle.

65. *Baliol revolted, and Edward seized upon Scotland.*—Very soon, however, Baliol, at the insti-

gation of his nobles, renounced his allegiance to Edward. The English monarch invaded Scotland, reduced all the principal fortresses to his power, and compelled the Scottish king to abdicate and resign his kingdom into his hands. On the 7th of July 1296, an English parliament was held at Berwick, where most of the Scottish clergy and laity took the usual oaths of fealty to Edward, and the supreme authority was entrusted to a governor, treasurer, and justiciar.

66. *Wallace defeats the English, but is at last put to death.*—At this crisis of the national history Wallace appeared on the scene. He raised the standard of revolt, and the people, conquered yet not wholly subdued, gathered around him as the national deliverer. Victory followed victory; and the English troops were forced to evacuate Scotland. Thereafter Wallace assumed the title of Governor of Scotland; envy and disaffection broke out in the ranks of the nobles; the patriotic army was utterly routed at Falkirk, and Edward I. was again master of the kingdom. The Scottish barons obtained peace by a capitulation; and Wallace, the great popular hero of Scotland, was betrayed to his enemies, sent to London, condemned to death as a traitor, and hanged at Smithfield.

67. *Robert Bruce defeats the English at Bannockburn, and Scottish independence acknowledged.*—The Scots again rose against the English, and this time with complete success. Robert Bruce, the grandson of the competitor for the Scottish throne before Edward I., became the champion and deliverer of his country. Under this intrepid leader the spirit of the

nation was thoroughly roused; the English were attacked in every quarter, and once more driven out of Scotland. Bruce was crowned at Scone in 1306; and, defeating Edward II. at Bannockburn on the 24th of June 1314, liberated Scotland for ever from subjection to England, and secured the Scottish throne to himself and his posterity. The independence of Scotland was formally acknowledged in the Treaty of Northampton on the 17th of March 1329. Till the quarrels arising out of the disputed succession to the Scottish crown, a friendly feeling had long existed between the inhabitants of the northern and southern kingdoms of Britain, but henceforth for nearly four centuries they were almost at perpetual war with each other. In these contests Scotland was to suffer unspeakable miseries.

68. *David II. taken prisoner, and afterwards ransomed.*—David II. succeeded his father Robert I. in 1329, and died in 1370. He was four years old when his father died, and the government was entrusted to Randolph earl of Murray. Edward Baliol, supported by the English, was for a short time king of Scotland; but, assisted by the French, who now first appear as the allies of the Scots, David was restored to his throne. David subsequently invaded England, and was taken prisoner at the battle of Durham; and after suffering captivity for eleven years, was ransomed by his subjects in 1357, and ended a turbulent reign in 1370.

69. *Robert II. the first of the Stuarts.*—On the death of David II. Robert II. ascended the throne in 1370, and reigned twenty years. He was the son of

Walter the Steward of Scotland, who had been married to Marjory daughter of Robert the Bruce. He thus founded the celebrated royal house of Stuart.

70. *The long regency of the Duke of Albany.*—Robert III. succeeded his father Robert II. in 1390, and died in 1406. He was unfitted to perform his duties as king, and his brother the earl of Fife, afterwards duke of Albany, was, under the title of Guardian, appointed ruler both of the king and his kingdom. The duke almost uninterruptedly retained his more than regal powers for thirty-four years during the nominal reigns of his father, brother, and nephew, and died in 1419. He ruled the people with the cruelest tyranny, and was imitated, not restrained, by the feudal nobility, of whom he was the chief, in all his oppression and despotism.

The duke of Albany was succeeded by his son Murdoch as regent. Murdoch had neither the talents nor the ambition of his father, and anarchy and confusion reigned supreme.

71. *Oppression by the feudal lords: The battle of Harlaw.*—Nowhere in Europe had the feudal aristocracy attained a loftier height than in Scotland. The power of the greater barons, which rendered them independent and often the rivals of their sovereign, was a source of perpetual disturbance and disorder in the kingdom. Robert I. when he attempted to diminish the vast territorial possessions of his barons by requiring every landholder to produce the titles of his estate, was boldly told by them that their swords were their charters.

The battle of Harlaw, which was fought on the 24th

of July 1411 between the lowlanders and highlanders, is an important event in our history ; for it ended in the supremacy of the kings of Scotland over the Lords of the Isles.

THE SOVEREIGN.

72. *The kingdom becomes hereditary : Parliaments are established and regents arise.*—The kingdom was now an hereditary monarchy, a new hierarchical nobility was established, and the parliament, composed of the three estates of the realm, becomes an important element in the government of the country. The principle of primogeniture has been preserved inviolate, with slight exceptions, for eight hundred years in the succession to the Scottish throne. But almost coincident with this principle a new feature in our government makes its appearance. I refer to the appointment of regents as substitutes for kings in minority, and guardians or regents for those who were permanently or temporarily incapacitated from discharging their royal functions. They were sometimes appointed by a predecessor and sometimes by the king himself ; but in no case could such appointment be effectually made without the consent, express or implied, of the Parliament.

73. *The king's functions.*—The king's functions may be thus briefly summarized : He was generalissimo of the national forces ; he was the ultimate arbiter of peace and war ; he made treaties with foreign potentates ; he was the supreme judge of the realm ; he

was the general state prosecutor for crimes ; he had the right of granting pardons to all offenders against the commonwealth ; he issued proclamations as to matters of public interest ; he could grant privileges to any of his subjects in the nature of monopolies ; and he had the exclusive power of coining for the whole kingdom.

74. *His privy council.*—As early as William I. in 1165, the king had a council to assist him in matters of government, and even in the passing of laws for the realm. This council is plainly referred to on many subsequent occasions, and merges in the king's privy council. At first it was chosen by himself at his own pleasure ; but on several occasions during this epoch he was obliged to restrain his personal inclinations in deference to the wishes of his people or their representatives. This council had cognisance of the manner in which those who held the king's commission in the various offices in the state conducted themselves.

75. *The king's high officers of state.*—The high officers of state and the ordinary advisers of the king in all national affairs were the Lord Chief Justiciar, the Lords High Chancellor, Marshal, Constable, Admiral, Treasurer, Chamberlain, and Steward, and the Lords Justice Clerk and Clerk Register. These exalted personages were usually chosen from the nobles, who eagerly sought the humblest office connected with the royal person.

The Lord Chief Justiciar was the highest judge in the land. He exercised all the judicial functions of the king in the royal domains, and had

exclusive jurisdiction in all pleas of the crown throughout the kingdom, unless granted to a lord of regality. These pleas were murder, rape, arson, and robbery. He was the king's deputy in legal affairs, and was occasionally superseded by him. He was the judge before whom appeals from the different sheriffs of the counties were brought. At first there was only one Justiciar, but by Robert III. c. 30, two were to be appointed, one for the north and one for the south of the Forth.

The Lord Chief Justiciar in Scotland never had so great powers entrusted to him as had been conferred upon the corresponding high functionary in England; and as the duties of the Great Justiciar in England gave way before the Lord High Chancellor, who became the highest judicial officer in England, so the same result occurred in Scotland. This probably arose from the Chancellors being frequently churchmen in early times, and also the most learned persons in the kingdom. At first the Lord High Chancellor managed the king's chancery, or the office from which all royal writs, charters, and the like issued; and in the next epoch which we will have to consider he also acted as supreme judge.

The Lord High Steward was the head or superintendent of the king's household.

The Lord High Chamberlain once had important duties to perform as to the king's revenue, and also as to the supervision of the royal burghs; but very soon he had little weight or concern in the duties of government.

The Lords High Constable and Marshal had

the supreme command of the king's forces in his absence, and when the king was himself present with his army, as was ordinarily the case in this period, they had the command of the cavalry and infantry respectively. Both these officials performed judicial duties in connection with their military offices.

The Lord Justice Clerk, as the name implies, was originally the assistant of the Lord Chief Justiciar, who it is to be feared knew much less about law and legal proceedings than his subordinate. It is therefore not wonderful that the Lord Justice Clerk should emerge at a later period as the second highest judge in the realm.

The Lord Clerk Register was the official who recorded the consultations of Parliament and the judgments of the king's justiciars; but he never rose to high judicial office like the Master of the Rolls in England.

76. *Origin of modern Scottish nobles: The new nobility and feudalism.*—Wealth is primarily the origin of all power and influence in the state in early times, and an hereditary nobility independent of riches was almost unknown in any ancient government. Unless as regards the royal races it was wholly absent in Greece; and unless as regards a limited right or chance of election to the senate it was unknown to the republic of Rome, and did not exist at all under the Roman Emperors, whose senators on their death did not convey to their children any right to a seat in the imperial senate. Wealth and distinguished services to the state as generals, statesmen, and authors were in ancient times the reasons for public

esteem and official rank. This was also the state of matters in the olden times in Scotland, whether in the lowlands or the highlands. The introduction of feudalism into Europe totally changed this condition of things; and large territorial possessions fell into the hands of the feudal barons, who were really independent princes within their own domains. The unsettled condition of Scotland made the burdens of feudalism very heavy and grievous.

77. *Feudalism introduced into Scotland.*—The kings of Scotland borrowed the principle of feudalism from their English neighbours, and many Normans were not slow to avail themselves of the generous gifts of land by the Scottish kings. The native Scots loudly complained of heavy burdens under their new masters, and large numbers of Normans were obliged to return to England; but the feudal principles which the southern strangers had brought with them into Scotland were left behind, and were adopted and improved upon by the king and by those Normans who remained in this country, and brought to perfection with all their hardships, cruelty, and oppression. Knowing when feudalism became a part of English policy, and also knowing that Scotland was then almost cut off from any intimate connection with the governments of the continent, was in close relations with England, and did not become the ally of France till the war for national independence, we may assume that feudalism was not a part of the Scottish constitution till the end of the eleventh century. As an organ of the state, it was a vast system of government by which every person in the country from

the lowest to the highest was connected with the rest, and by which, in return for grants of land, military service was to be given.

78. *Feudal tenures become almost universal in Scotland.*—The germ of this kind of holding land is to be found in the necessities of conquerors in dealing with conquered territory, *e.g.* of the Romans; and feudalism was forced upon all the peoples and races who succeeded to the inheritance of Rome in the west of Europe. In the course of time, and in consequence of the insecurity of life and property during the dark ages, the original native landowners who held their possessions free from all feudal services were glad to obtain the protection of a great military lord in exchange for homage and consequent duties. In early times military service was the essence and soul of feudalism; but money was afterwards accepted in satisfaction of services in the field. Ultimately, and as soon as standing armies became fixed institutions in modern Europe, it was found convenient by the king's tenants to relieve themselves from feudal obligations, and throw the burden of the national army upon the people in general.

79. *The fundamental notions of feudalism.*—(1.) Homage was paid by the tenant to his lord, and was a promise to the effect that he would aid his lord on all just occasions and against all his enemies. This engagement was made on his knees, and with his hands within his lord's hands. (2.) Protection was promised by the lord to his tenant. This was a reciprocal obligation, and almost invariably accompanied by a grant of land for life or some shorter term by the

lord to his vassal. The close resemblance in several respects between the Roman relationship of patron and client is worthy of being noticed.

80. *The sovereign was the head of the feudal hierarchy.*—The sovereign was at the head of the feudal hierarchy, and the fountain of honour and justice; and his court, which was the highest in the kingdom, was attended by his own vassals alone, and ultimately became the parliament of modern times. In like manner the great feudal lords and other freeholders had their own courts, and exercised all the functions of government within their own territories, in subordination of course to the highest or supreme courts of the country. These functions were both judicial and legislative.

81. *The king's army in feudal times.*—It is difficult to say what in feudal times was the greatest strength of the king's army, which, as we know, was composed of the king's military tenants and their sub-vassals, but about the time under consideration it has been estimated at 40,000 men. At Halidon Hill, in 1333, the Scottish forces amounted to nearly 15,000. The king's feudal tenants were bound to serve in the royal army in a fixed proportion to the land or knight's fee they held from the crown, and in all his wars, for forty days a year free of all expense, and defend the nation against the attacks of enemies at all times. This last duty was incumbent on all the members of the community, and various regulations were passed for compelling the attendance of all the king's free subjects at "weapon-shawings," in presence of the sheriff, at stated intervals during the year. These

military exhibitions were obligatory, not only upon all freeholders and their tenants, but upon all who had a certain amount of personal property.

82. *General picture of the king and his nobles in the feudal period.*—The Scottish king thus stood at the head of a powerful aristocracy, and was surrounded by many signs of pomp and grandeur. His revenues were chiefly derived from the rents of his own lands, the casualties derived from the feudal possessions of his tenants, and the fines and forfeitures of delinquents. Of taxes or customs in the modern sense there were very few, and the country was too poor to be able to contribute much from its trade or commerce. The great potentates imitated the customs and practices of the royal palace in its minutest particulars, and a few of them rich in resources, *e.g.* the Douglasses, emulated and even surpassed the pomp and dignity of the king. This emulation proved fatal to some of the oldest families, and the nobles themselves were not slow to aid the sovereign to pull down any dangerous subject whose lands were likely to be confiscated and divided amongst themselves.

THE PARLIAMENT.

83. *First known use of the term.*—In this age we come into contact with the first steps towards the establishment of “Parliament,” which term is certainly not used in Scotland earlier than 1289, and its earliest use on record is by Baliol at Scone in 1292. Previous to that date we have undoubted proof that several assizes were held by the king and his nobles and others of his

subjects ; and as these exercised duties similar to those afterwards performed by Parliament, I consider that they afford evidence of a more ancient general council than our parliamentary records would entitle us to assert. In 1214 (Alexander I. c. 1) the words are, "with consent of his earls ;" c. 2, "with counsel and consent of the venerable fathers, bishops, abbots, earls, barons, and his good subjects ;" and c. 3, "with consent of his community." The statutes of 13 Robert I. are passed "with common advice and consent of all prelates and freeholders and whole community ;" but it is clear to me that the persons present were the bishops, abbots, priors, earls, barons, and tenants in chief, and none else.

84. *The enacting clauses in the early statutes.*—In the assizes of David II. (1330-1370) the words generally used are, "the king statutes ;" but c. 17 has "the king, with the consent of the prelates, earls, and barons ;" and c. 27 and c. 29, "the king, with the consent of the community of the realm." In 1346 there is an acknowledgment of the price of David's ransom by the Scottish Parliament, and an obligation entered into by each of the three estates—clergy, barons, and burgesses—and also by certain individuals, for payment of the money ; and in the Parliament of 1347, c. 40, the words are, "at the instance and request of the three estates ;" and in c. 41 "with consent of the three estates." In the Parliament of Robert III. c. 17 (1372), there is a declaration that the king promised to keep the laws then made ; and it is stated that an oath to observe the same was given by "all and sundry prelates, procurators of

prelates, and others of the clergy, all earls, barons, and burgesses present." Lastly, in 13 Robert III. (1400), the Parliament was held with "all bishops, abbots, priors, dukes, earls, barons, freeholders, and burgesses holding of our sovereign lord in chief."

The statutes of the Parliament were ordered to be read and published in all the jurisdictions of the realm and in all places where the people congregated. *Vide* Statute of Robert I. c. 34 (1319).

85. *The chief elements of our modern Parliaments in existence.*—All the chief elements of our modern Parliaments were now in existence. The great council of the nation was composed of the king's tenants in chief, and its members were the lords spiritual and temporal and the commissioners of the citizens of the royal burghs. There was as yet no substituted representation of the smaller freeholders of the king, and all the king's tenants who did not appear in the royal court at certain times of the year were liable to be fined. In this august assembly for consultation, deliberation, and judgment the king sat in his chair of state, and was surrounded by his tenants or vassals, who occupied particular places of honour according to their titles and rank. The king's chief tenants alone, that is to say, those who held land from the sovereign, had the right to be present at the king's great court or council, and neither the ordinary farmers or cultivators of the soil, nor the inhabitants of towns within the estates of the nobles or of the Church, had at this time any place in the national council, and none of these were called upon to discharge any public duties unless through their superiors,

who might be lords spiritual or temporal, holding land directly of the crown.

86. *The Parliament was the supreme court.*—On feudal principles, Parliament must have been the supreme court of Scotland, and it is proved to have been so in point of fact by the Treatise on the Baron Courts, in which it is laid down (c. 16) that, security being found, there was an appeal in all cases to Parliament, but from Parliament there was no appeal, because it was the highest court in the kingdom, and was ordained for the remedy of all courts under it.

87. *Proxies or procurators appointed.*—That procurators or proxies were frequently appointed by most of the members of the Parliament there can hardly be the slightest doubt; and that they were appointed down till the Union between England and Scotland is equally beyond question. It is quite true that in the assizes of David II. and Robert II. there are enactments that none except those elected should be in the king's courts; but those regulations applied to the practice of having councillors in the house in attendance on the members.

88. *Commissioners from the royal burghs.*—We know that representatives from burghs were first mentioned in the English Parliament in 1264, and they are not likely to have been present at any Scottish Parliament at an earlier date. It may be that the burghs were not at first asked, or rather compelled, to send representatives to the great council of the nation, unless their interests were involved. Indeed, I rather think that this was the leading idea which guided our early kings in deciding who were to be

present at any particular general council ; and this was probably the reason why the burgesses appear as consenting parties in a treaty which was made with France in 1295. It also appears that in the Parliament of 1326 the burgesses contributed toward the expenses of the national war of independence ; and by the power which the large towns had over the national resources, and from the increasing pecuniary difficulties of our sovereigns, the burgesses soon obtained the great influence which they still possess in the affairs of the nation. Nay more, I am inclined to believe that the burgesses never were excluded from having a large share in deciding upon the destinies and policy of the country ; for the king's burgesses, in their collective capacity, were tenants in chief, *i.e.* held land within the burgh directly from the king. Most assuredly, as early as 1326, the burgesses are comprehended under the free tenants of the king. Thus, in the indenture as to the expenses of the war of independence, it was agreed between " the king, earls, barons, burgesses, and all others his free tenants," that the king should receive the tenth penny of the lands and rents of his tenants for life.

Still further, we need not be surprised that the royal burghs had no clear and definite place in the first great councils of the nation ; for, as will be seen, they had a parliament of their own, and they there decided not only questions of private right, but even made rules as to the succession of the burgesses. There were two such parliaments, one for the North and one for the South ; but the latter was the most important of the two, and ultimately comprehended

both. Here the burgesses reviewed the decisions of the separate burghs, and their president was the king's Lord High Chamberlain. From the decision of the Lord High Chamberlain and the four Burghs of the South there was no appeal to Parliament. (*Vide* Parliament of David II. of 1348 and Charters of four Burghs of 1405.) The words of the latter authority are wide and comprehensive, and are in strong contrast to the present limited functions of the Convention of Royal Burghs. They are in these terms, namely, that two or three burgesses of the royal burghs south of the Spey should compear yearly in the convention of the four burghs "to treat, ordain, and determine upon all things concerning the utility of the common weal of all the king's burghs, their liberties and courts."

THE CHURCH.

89. *Its great power and influence.*—The Scottish Church of this age reached its greatest pitch of grandeur. It was immensely rich by the pious benefactions of its members, and its ministers possessed almost all the learning and science at the king's court, and rose to places of the highest trust and emolument in the service of the state. Gradually priests began to settle in the towns and on the estates of the great lords, and became more or less independent of the monastery or priory in the neighbourhood, and simultaneously bishops rose to power as the spiritual overseers of the secular clergy of a district or diocese, and the authority of the abbots and priors was restricted to their own lands and estates.

90. *It was remodelled on the principles of the feudal system.*—The church system was greatly modified by David I. and William the Lion, and was reduced by them to the order or pattern of the continental, or, as it may be called, the feudal system : that is to say, of archbishoprics, bishoprics, deaneries, chapters, and parishes ; and further, some of the great monastic societies were re-organised into the sees of bishops. The episcopal order thus became the heads of great feudal corporations, which held extensive and valuable landed possessions ; and, by their learning and family influence, exercised a vast influence as pioneers of civilization in their respective dioceses. But the bishops were not at liberty to dispose of their lands without the king's confirmation ; because, says the *Regiam Majestatem* (l. c. 23), their lands and baronies are a part of the alms of the king and his predecessors.

91. *The coercive and voluntary jurisdiction of the Church largely increased.*—Even in the time of the Roman empire the bishops were entrusted with judicial authority, which was exercised by them after Rome was finally overthrown, and their powers in legal matters were largely increased by the voluntary submission of disputants, and by the coercive power which they held as the upholders of morality and as the vicegerents of God on earth, and by means of the usurpations made by the Church on the civil power in the twelfth century. Within smaller limits, but with no less authority, very great influence was exercised by the heads of the abbeys, which were founded towards the end of the previous epoch and

about the beginning of this. These abbeys owed their existence to the munificence of sovereigns and the great nobles. They had exclusive religious jurisdiction within their own boundaries conferred upon them by the Pope, and, within the same limits, also all the rights of the king as to crimes and civil actions.

Thus the Church became vested with extensive judicial powers both spiritual and temporal. She was the sole judge of marriage and dowries, legitimacy and bastardy, testacy and intestacy, advocacy of kirks and rights of patronage, and even arrogated to herself the decision of all questions arising out of ordinary debts in which the oaths of the parties had been interposed.

THE ADMINISTRATION OF JUSTICE.

92. *Courts baron.*—The kingdom of Scotland was formed by the compulsory aggregation of many separate and independent states or communities, whose chiefs or princes were allowed to retain most of their royal prerogatives on the condition of their acknowledging the king of Scotland as lord paramount. When feudalism was introduced into the country no change was made in this respect, and many of the new nobility or great feudal lords, spiritual as well as temporal, had all the royal civil and criminal prerogatives of the crown bestowed upon them by the king; and every baron of the king, *i.e.* every immediate vassal of the king, had jurisdiction in his own court baron over all his tenants in all matters of a civil and in most of a criminal nature. Substantially then,

what we have to deal with in the judicial administration of the country during this epoch is a series of baronial courts from the king himself down to the humblest subject who held land directly from the king. Soon after the introduction of feudalism, it was universally laid down by the lawyers, and was very nearly in harmony with fact, that all the land belonged immediately or mediately, directly or indirectly, to the sovereign; and just as the king had a court composed of his tenants, so every feudal vassal of the king had his court, in order to support his dignity and enforce his rights within his own domains. To this general system, the royal burghs, which were erected on the king's own territories, or had royal charters granted to them, were no exception.

93. *The pleas of the crown.*—As I have already hinted, the jurisdiction of the nobles and feudal tenants was not, in all cases, precisely the same as that which was exercised by the king. Thus, the crown pleas tried in any part of the kingdom naturally fell under the jurisdiction of the king's chief justiciar in his ayres or circuits throughout the country. But, as I have said, the great landowners were frequently raised to the dignity of lords of regality, and thus had all the sovereign judicial powers conferred upon them; and most of the large royal burghs had charters with similar powers granted in their favour. These rights were territorial, and, like the lands to which they were attached, became hereditary in families and corporations; and, unless justice was denied, the king's judges had no right to interfere with the administration of justice within the territories of the lords of

regality. The great lords and favoured burghs appointed justiciars to discharge their legal functions, the baronial lords pure and simple appointing stewards or bailies, and the magistrates of burghs exercising their judicial functions in person with the assistance of their town clerk as assessor.

94. *The sheriff courts.*—The sheriffs of counties were invested with all the ordinary jurisdiction of the king in their respective shires, but they had no original jurisdiction in the crown pleas, which were reserved to the king's chief justiciars or the regality lords, who were supreme judges civil and criminal. The sheriffs' jurisdiction comprehended all pleas as to women's terce, homage, relief, agreement for final concord, debts of laymen, bondage, inquisition of theft and murder, and in default of the barons "tulzies," strokes, and wounds.

95. *The order of appeal from inferior courts.*—The sheriffs were the judges of appeal from the courts baron, and an appeal lay from the sheriff to the chief justiciar, and from the latter to the king in Parliament assembled. But, for a time at least, all appeals from the burghs had to be taken to the Convention of Royal Burghs.

In early times the right to hold a court was a rich source of revenue.

I shall now state a few miscellaneous regulations as to the administration of justice in the present epoch.

96. *General regulations against bribes, &c.*—By 13 Robert I. c. 21 (1319), judges were prohibited from maintaining pleas or taking rewards in the king's courts, and offenders were to be punished at the king's

will, and lose office for life ; and (Ib. c. 30) judges who maliciously adjourned their courts were to lose their goods and office, and their life was to be in the king's will. The statute of 2 Robert I. c. 15, lays down the righteous principle that no man should judge in his own cause, and he who contravened this enactment was to be fined by the king, and give satisfaction to the injured party. Then, by 2 David II. c. 18 and c. 41, it is declared that, independently of the king's command, justice should be equally done to all men ; and (Ib. c. 30, 1347) sheriffs were ordered to do equal justice to all, and were held answerable for their deputies. This interference with justice by the king's orders was a cause of long and serious complaint.

The granting of royal pardons also led to much injustice ; and it was therefore enacted by David II. c. 44, that, unless the injured party was satisfied within a year and day of their date, no remissions granted by the king for crimes were to be valid. The right of repledging also appears to have been used for defeating the ends of justice ; and by a declaration of Robert III. c. 14, this right was limited so that it was not to be exercised when the apprehension of the offender had been ordered by the king or his justiciar, *e.g.* in murders, prison breaking, theft, felony, excommunication, and rebellion.

97. *As to sheriffs, their deputies and clerks.*—A statute of David II. c. 9, ordered sheriffs to hold courts every forty days, and commanded the bishop and earls of the sheriffdom, the sheriff, and lords of every village to be present ; and by a statute of an earlier date (Alexander II. c. 14) the sheriff or his

deputies had to give their attendance at the courts of bishops, abbots, earls, and freeholders; and strange to say, Robert III. c. 23, declares that the sheriff-clerk was in future to be appointed by the king.

98. *Trials by hot water or iron*.—These were in existence in the reign of William I. (c. 15), and were soon afterwards abolished or disused. According to the statute of William, if a person was challenged for theft or for having given ransom for theft, and proof thereof was given by the provost and three of the indwellers of a burgh, he was to underlie the law of water, and if three other witnesses gave similar evidence he was to be immediately hanged. Here we have the element of doubt introduced as the reason for this appeal to God for a decision. Elsewhere we are told that when a thief was taken red-handed he was hanged.

99. *Singular battle*.—This was another rude way of deciding the rights of litigants. Yet the practice was not so absurd as some have imagined; for it was not available when there was plain proof, and was used only in crimes of falsehood, and when the point in dispute was doubtful. Thus, if an action was raised for money borrowed and lent upon an alleged writ, and on comparison of seals the defender was found to be wrong in his statement, judgment was given against him; and, if the matter was doubtful, singular battle was allowed (*Reg. Maj.* III. c. 8). The accused might also decline singular battle on the ground of bodily infirmity and old age (*Ib.* IV. c. 3). See also the statutes of David II. c. 28 (1330), and Robert III. c. 16 (1440), as to persons who were obliged to fight, and in what causes. In the reign of Alexander II.

single combat was not unknown in our judicial contests, but afterwards rapidly fell into disuse.

100. *The first appearance of the jury trial in Scotland: the primitive duties of juries.*—The sheriffs of the counties were assisted by the freeholders who were suitors, *sectatores curiæ*. In the *Quoniam Attachamenta*, we are told that these had to appear at the sheriff's head courts and be examined before they were admitted to act; and if they pronounced a judgment which was afterwards falsified, *i.e.* laid aside as contrary to law, each was fined £10. Thus we have arrived at a time when the jury trial began to be developed. At first, the freeholders were the judges, and the sheriff or other judge merely the president or assessor; but, in the course of time, the duties of judge and freeholders were almost reversed, or rather the powers of the freeholders became greatly diminished. By a statute of Alexander II. c. 2, an inquisition upon a knight was to be made by an assize of knights of heritable freeholders; and (*Ib.* c. 3) no oath was to be received as to the loss of life, limb, or land, unless by faithful and good men and freeholders by charter.

101. *As to justice ayres.*—By the statutes of William I. c. 2, the abbots, earls, barons, knights, and freeholders, who were charged by the king's precept, were bound to attend the justiciars ayres, and the justiciar and his deputies were alone to hold crown pleas, which, besides treason against the king, were murder, rape, robbery, and wilful fire-raising. By Robert III. c. 34, the justiciar in his ayres, which were held twice a year in different parts of the country, was to challenge the sheriffs and other judges of the

king ; and, if he found fault with them, was to suspend and report them to Parliament.

102. *Sentence of death.*—By Robert I. c. 3 (1319), men condemned to death shall not be redeemed saving the king's power, and the liberties granted to the kirk and kirkmen and other lords. This statute is re-affirmed by David II. c. 50 (1367), and deserves particular notice ; for it points out in what manner the idea of compounding for murder and other crimes punishable by death then existed. Formerly it was thought that compensation to the king or chief and the deceased's kindred was sufficient. Now a wider conception is becoming developed, namely, that the public at large have an interest in the prevention and punishment of crimes.

The statute of David is in these terms : No remission shall be given for wilful murder till inquisition. If murder has been committed, the king has promised not to give remission except by the advice of the general council as they shall think for the good of the realm ; and if manslaughter is committed by "chaud melee," the king will consult with the good council. Here may be seen the mode in which the modern right of the sovereign to grant remission for murder was once exercised.

I now wish to draw your attention to our most ancient laws contained in Skene's collection, which comprehends (1.) the pretended laws of Malcolm II. ; (2.) the *Regiam Majestatem*, or alleged code of David II. ; (3.) the *Quoniam Attachiamenta* of old, yet unknown date ; and (4.) the statutes of William I. down to Robert III. (1165-1406.)

LAWS CIVIL AND CRIMINAL.

103. *The laws of Malcolm II. are spurious.*—The alleged laws of Malcolm II. are rejected as forgeries by all competent authorities. Their history is unknown till the reign of James III., and their claim to authenticity is based on their being supposed to be referred to in the Statute Book (*Vide* 14 James III. c. 113). The objections to their authenticity are threefold: (1.) They contain assertions which are palpably false; (2.) they refer to a state official who had no existence in Scotland till long afterwards; and (3.) several of their provisions are contained in subsequent statutes. Take these points in their order. First, ward and relief are said to have had their origin thus: King Malcolm gave and distributed all his land of his realm of Scotland amongst his men, and for the king's sustenance all his barons gave the king ward and relief of the heir of every baron when he should die. There is no extraneous proof or the slightest corroboration of any such distribution in the reign of Malcolm II., or even of Malcolm III., or in any period of Scottish history. Second, certain fees are said to be payable to the Constable; whereas there was no such officer known in England till Henry I., and none in Scotland till after his reign. Third, the statutes which agree with subsequent enactments are these: c. 10 with William c. 7; c. 11, § 1, with Alexander II. c. 14, § 2; c. 11, § 2, is an inference of c. 11, § 1; c. 12, §§ 1, 2 in *Quo. Atta.* c. 12; and c. 13 is an amplified repetition of c. 11. These objections

are fatal, and accordingly I do not place any reliance on these spurious laws in this history.

104. *The Regiam Majestatem and Quoniam Attachiamenta, &c. are authentic.*—With regard to all the other specimens of our ancient laws contained in Skene, I have to say that, whether they are really what they pretend to be or not, they undoubtedly show us some of the foundations of our peculiar jurisprudence, and, perhaps, without a single exception, give us the authentic records of our early laws. The *Regiam Majestatem* belongs most probably to the reign of Robert I. (1306-1329), and not to that of David I. (1124-1153). A minute comparison with Glanville's Treatise, which was certainly written in the reign of Henry II. (1154-1189) has induced Cosmo Innes and other competent authorities to acknowledge that the *Reg. Maj.* is a copy of the English justiciar's work, altered to suit the local circumstances of Scotland, and to be interspersed with numerous extracts from the civil and canon law, and some well-known and genuine specimens of the laws of our early Scoto-Saxon kings. The earliest MS., which is preserved in the Advocates' Library, appears to be written in the fourteenth century. Both the *Regiam Majestatem* and the *Quoniam Attachiamenta* are referred to in the Statute Book in the reign of James I. (par. 1425, c. 10) and afterwards. Moreover not even the breath of suspicion has ever been cast upon the statutes from William I. to Robert III. I therefore consider that I am entitled to avail myself of all the sources of our law which I have just enumerated, except the so-called laws or statutes of Malcolm II.

105. *The Regiam Majestatem: its contents.*—The *Regiam Majestatem* consists of four books. The first treats of civil actions and jurisdictions; the second, of judgments and executions; the third, of contracts; and the fourth, of crimes. In the first book we have an examination of the *briefe of right*, which was used for settling disputes about real property; and from which it appears that twelve men were required to give an unanimous verdict for the pursuer or defender. This verdict was obtained by withdrawing and supplying assizers till there was unanimity amongst them. There are also many regulations as to the guaranteeing of sales of land and movables, and these would appear to show that guarantees were almost universal in all sales. Then follow several chapters on *pactions*, which are divided into real and personal, profitable and unprofitable.

The second book begins with arbiters, and lays down what is even now the law, namely, that a decree arbitral shall be obeyed whether just or unjust, provided it is not contrary to the laws of the realm, and no deceit or guile has been committed by the arbiters. Next there is a minute description of the proceedings under a *briefe of bondage* and the modes of manumission. Amongst the latter are residence for a year and a day in a burgh, and for seven years on a master's land without challenge as to bondage. Moreover, it is expressly declared that a bondman cannot free himself by his own earnings, because all these belonged to his master. Then the widow's *terce* is discussed, and the causes for which it is lost, *e.g.* adultery, and the conviction of a husband for treason

or felony. It is also laid down that parties intending to marry may make agreements before marriage as to the provisions which are to take effect at their respective deaths. With regard to succession, we are informed that a knight's son succeeds to all his father's lands; and where the land is held in soccage, or free tenure, it is divisible between sons equally, and the elder shall have the chief messuage; and when daughters succeed, all of them receive equal shares. Testaments could then be made by all persons, and the power of devolution was very extensive. If, however, a man was married and left a widow and children at his death, the former got one-third of his personalty, and the latter one-third; and if only a widow, or only children, either received one-half; and the remaining one-third or one-half, as the case may be, was at the disposal of the defunct. This is the law still. There is also an important section in this second book to the effect that there was then no legitimation *per subsequens matrimonium*. The right of courtesy is also explained, and defined to be the right of a husband to the liferent of his deceased wife's heritage when a child of the marriage has been born and heard to cry.

The third book treats of debts, buying, selling, and pledging, and is well worthy of careful study.

The fourth book deals with lesse-majesty, which was the name of the crime committed by one guilty of the king's death, or of sedition against the realm or in the king's army. As in all pleas of felony and sedition, the punishment of lesse-majesty was the loss of life or limb according to the king's mercy, confiscation of the offender's movables, and the offender

and his heirs were perpetually disinherited from the offender's lands. Theft was then severely punished; and, verifying for once a popular notion now exploded, a man who fell from the gallows was freed, and the hangman fined! At the end of this work is a list of assythments, but these are not thought by Skene to be authentic; and afford little information as to the subject on hand.

106. *The Quoniam Attachiamenta: its contents.*—The *Quoniam Attachiamenta* contains valuable information as to the legal proceedings under our ancient system of jurisprudence. The first step in the civil process was an attachment, which was a lawful bond by which the defender was constrained to stand to the law, and answer judicially to the party complaining in legal form. Then followed the summons, which was served by the serjeants of the court, and was a command to appear before the inferior courts in fifteen days, before the superior in forty if within the realm, and twice forty if without. At the fourth court, if the defender appeared, the pursuer had to be prepared to prove his demand; and if he was not, the defender, who denied the debt, might acquit himself at the next court by his own oath and the oaths of five men swearing with him. In the latter case the defender was to swear that he did not owe the debt, and that he brought true and liel men to swear along with him, and then they should swear that the defender's oath was true and not false. If the pursuer succeeded, the judge was to take a pledge or security from the defender that he would pay in fifteen days, and if he refused, distress and pouding were to be

executed. The doom or judgment of the sheriff court was given by the "soytours," or representatives of the barons; and, if falsified, *i.e.* proved unrighteous before the justiciar, each soytour was fined £10. Wager of battle was still a means of judicial investigation. Replegiation was also practised in the courts; and consisted in an offender or defender being handed over to another court on an understanding that justice would be done. This practice arose out of the jurisdiction which every freeholder had over his vassals, and could be exercised in almost all cases, except in the pleas reserved to the crown.

There were several kinds of brieves, which were common forms of action in cases of most frequent occurrence. These were the brieves of distress for debt, of mort ancestrie, of disseisin, of breaking the king's peace, of bondage, of warrandice, and of right. The assize is frequently mentioned in this Treatise, and consisted of twelve liel and true men, unless in falsity of doom, when the number was twenty-four.

107. *General conception of an ancient civil suit, and its decision by an assize.*—With the help of the *Regiam Majestatem* we can form a very accurate notion of the proceedings in a civil action in those ancient times. For example, take those under a brieve of right as to heritage. This brieve was available when one person by force and violence withheld lands from another, and was issued out of the king's chancery, and called upon the defender to compare and answer. Let us suppose that the defender referred his right to God and a good assize of his neighbours. In this case the assize had to find out who had most right to the

lands claimed. Therefore, twelve loyal men, neighbours or of the court, were chosen, and they had to swear the great oath in presence of the parties that they should declare who had best right. All suspected persons were repelled from the assize, and if none of the assizers first chosen knew the truth, and testified the same by their great oath in the court, other persons were chosen in their place, until such men as knew the truth could be found, and the assize was thus purged of those who were ignorant of the facts till twelve men agreed for one or the other of the litigants. We are also told that the assizers were to swear that they would deal justly between the parties, and that they must know the truth by sight or by hearing by themselves, or by the narration of their fathers, or by such tokens and arguments as those to which they would give faith in their own proper sayings and doings. After the assize had ascertained the truth in the matters submitted to them, the judge pronounced the doom; and if afterwards the doom was falsified, the assizers had their movables escheated to the king's use, and were imprisoned, and held to be infamous.

This brief outline will explain the source and original reasonableness of obtaining unanimity, and will also show inferentially that witnesses might be called in support of the claims of either party. This latter inference is not free from obscurity, and is contrary to what has been usually held on this subject; but if the assizers could give their verdict on the evidence which they might have received before the trial, I cannot suppose that our ancestors would object to evidence being given in the court itself.

By a statute of Alexander (1214), c. 3, the assize of life and limb, or of land, was to be composed of faithful and good men, and freeholders by charter. This was a departure from our primitive laws, and shews the influence which feudalism was gaining upon the judicial conceptions of our ancestors.

HERITAGE.

108. *Homage and allegiance.*—These were two of the services which were due by a vassal to his lord, and the former was rendered to the chief or principal lord. Homage without allegiance was a promise by the vassal that he should be the lord's man, lie and true to him for his lands, and preserve and keep his worldly honour, saving his faith to the king and his heirs (*Reg. Maj.* II. c. 61 and 62). The lord made a correlative promise to his vassal (*Ib.* c. 67). To do anything toward disinheriting his lord, or hurting his body, or anything to his shame and dishonour, was a violation of homage by the vassal; and the offender, on conviction by his peers, was punished by disinherittance (*Ib.* c. 63). By Robert III. c. 4, the superiority of land could not be conveyed away without the vassal's consent. This statute strongly evinces the notions of mutual protection which the feudal system involved.

109. *The heir entitled to his ancestor's land.*—If an heir is a minor, and in ward, he shall get his lands into his own hands at twenty-one, and he can enforce his claim by writ of mort ancestor; and if he is of age

he shall enforce his right by brieve of recognition in the court of his lord (2 Robert I. c. 6).

110. *Widow required lord's consent to her marriage.*—A widow may not marry without the consent of her lord, and may be compelled to give security that she will not (Alexander II. c. 23).

111. *Heir of conquest.*—A doubt having arisen in a lawsuit as to the person who was heir of conquest, it was enacted by Robert III. c. 21, that the heirs of the last and youngest brother in the conquest of lands was the next elder brother.

112. *Co-heiresses.*—The division of heritage amongst sisters shall be equal, unless the land was given to be held of the over-lord (Robert III. c. 35). It ought to be here noticed that this rule did not extend to the succession to the throne.

113. *Soccage.*—Where an heir succeeds to soccage, that is, lands free from the feudal burden of ward, relief, and the rest, and he is in pupilarity, his tutors shall not waste or destroy, sell or wadset, the estate; and tutors, at the perfect age of their pupils, shall make full count and reckoning of their intromissions (2 Robert I. c. 18).

114. *Lawful age of heirs.*—The lawful age of those who succeed to land held by ward and relief is twenty-one if males, and fourteen if females; of those who succeed to soccage land, the lawful age of males and females is fifteen; and to burgage, fourteen (*Reg. Maj.* II. c. 41).

115. *Ward.*—The casualty of ward was exigible by the over-lord of land held by his vassal by knight-service (*Reg. Maj.* II. c. 42). With recognition

and marriage it formed the casualties of ward holding, and might be taxed or untaxed. When untaxed, this casualty (Ers. I. 5. § 5) entitles the superior during the heir's minority to the whole profits of ward fee, which formerly arose to the deceased vassal either from the natural produce of the ground, or from the rent payable by tenants.

116. *Subsidies given when lord's eldest son knighted, or eldest daughter to be married.*—When the lord made his son and heir a knight, or was willing to marry his eldest daughter, his vassals shall give him a subsidy thus: for a knight's fee, 20s.; and if more than a knight's fee be held, then proportionately more; and if less, then less (2 Robert I. c. 18).

117. *Vassal not to sell by sub-infeudation.*—It shall be lawful for a freeman to sell his lands at his will and pleasure, so that the buyer shall hold of the lord who is the lord of the seller, and for the same services and duties as the seller held the same; and the buyer infest shall hold of the immediate lord, and be bound to perform the services conform to the quantity of the land (2 Robert I. c. 24).

The object of this law was, to protect the over-lord from the effect of conveyances by his vassal, by which the former might be unable to enforce his rights.

118. *Alienation.*—If a freeholder give or sell any part of his lands, he shall leave as much as will pay his over-lord the services he owes him; and if he do otherwise, and is called before his lord's court, he shall lose all his lands, unless his lord consent (William I. c. 31). So long as the feudal system was kept up, this requirement was reasonable.

Alienations may be made by a farmer of land for a term certain to whomsoever he pleases before the term expires, but not later (Robert III. c. 18).

119. *Alienation on a death-bed.*—The ancient law as to the conveyance of heritage by a person on his death-bed, in prejudice of his heir, is contained in a statute by William I. c. 13, which subsisted for about seven centuries, and was abrogated quite recently (34 & 35 Vic. c. 81). It stood thus: No man in his sickness whereof he dies, in prejudice of his heir, may dispose or gift to any man his lands pertaining to him heritably, within burgh or without, or any lands which he conquests (acquires by himself), in the time of his death, except he be burdened with debt, and compelled by necessity to sell or wadset his land.

120. *Unlawful gifts of land to religious houses.*—It is unlawful to give lands to any religious house, and then receive them back to be held of the same religious house; and where this enactment is contravened the lands shall go back to the original donor (2 Robert I. c. 2). This law was passed with the same object as the last, *i.e.* to prevent gifts from being made by which the superior would be deprived of his services, military or otherwise. For sometime it was thought that church lands were not liable to military service; but, as a general rule, this opinion was erroneous.

121. *Unlawful disseisin.*—No one shall be poulded, unless for suit contained in his charter (2 Robert II. c. 2).

MOVABLES.

122. *Intestacy*.—When a person dies intestate, all his goods and cattle belong to his lord ; and if he has more lords than one, each shall have as much as is in his own lordship and domain (*Reg. Maj.* II. c. 53).

123. *Wreck*.—If a man, dog, or cat is living and saved from a wreck, the owner shall claim the wreck within a year and day ; and if not so claimed, it shall belong to the king or his donee (Alexander II. c. 25). The barbarous practice of rendering this law inoperative was long known in the North after the passing of this humane statute.

OBLIGATIONS AND CONTRACTS.

124. *Husband's obligations for wife's contracts*.—The law on this subject as found in the *Reg. Maj.* I. c. 30. § 6, subsists to this day, and is as follows : Pactions made by a wife are unprofitable, that is to say, the wife cannot make any paction or contract without the authority or consent of her husband. Another ancient principle on this head is, that in all the contracts of a wife for household necessities and the like, it is implied that the husband gave his consent to the same, unless the contrary is proved.

125. *Buying and selling*.—Buying and selling are effectually and perfectly complete after the contractors are agreed as to the price, and the thing bought and sold is delivered to the buyer ; or the price is paid in

whole or in part ; or when arles (or God's money) have been given by the buyer to the seller, and is accepted by him. The parties may agree to pass from the contract, and then the general rule is that paction between parties is above the law (*Reg. Maj.* III. c. 10. § 2, 3, and 4). Again, if the thing is sold as without fault, and the buyer prove that the fault existed at the time of the sale, the seller shall take back the thing sold (*Id.* § 8). Lastly, the peril of a thing bought or sold generally pertains to him who is possessor thereof, unless there is a paction to the contrary (*Id.* III. c. 11. § 1).

126. *Cautionary*.—If a debtor can pay, a cautioner shall not be obliged to perform his obligation ; and if the former cannot, the latter shall have the lands and rents of his debtor till he has been repaid what he has been obliged to pay for the principal debtor (2 Robert I. c. 10).

127. *Bankruptcy*.—Every bankrupt shall swear that he has no more than five shillings and a penny, and will not retain more than two pence for his meat and drink, and will give every third penny for the payment of his debts ; and if he fails again, he shall be banished (*William I.* c. 17). Thus we see that the ancient laws against bankrupts were much more severe than they are now, and made the necessity of paying creditors in full a legal duty.

CRIMES.

128. *Treason and conspiracy against the king*.—When any man is accused or defamed (suspected) of

the king's death, or of sedition against the realm or the king's host, the trial shall be in presence of the justiciar; and if the accused be condemned, his life and limb shall depend on the king's good will, as use is in all other pleas of felony and sedition against the realm, and he and his heirs shall be perpetually forfeited in all time coming. If the pursuer alleges in court that he did see, or that he knows that it is proved in any way that the accused did imagine, or purpose to have done anything anent the king's death, or anent the sedition of the host, or that he gave consent, council, or authority thereto, and offers himself ready to prove and verify the same, and the defender denies the charge, the plea may be decided by singular battle, or the defender may elect to be tried by an assize. The punishment on conviction was the same as in high treason (*Reg. Maj.* IV. c. 1).

I have already had occasion to refer to some of our ancient laws as to treason, and therefore I need here only observe that, by 13 Robert I. c. 20, conspirators, or narrators of murmurs by which discord was excited between the king and his people, were to be imprisoned; and if attainted, they were to be imprisoned till the king declared his will.

This last statute grievously errs against the liberty of the subject; because it leaves the offender to be dealt with at the capricious will of the king, instead of being punished on a fixed, determinate principle, and according to a well-known rule. Some of the Scottish statutes, although remarkable for their brevity and terseness, are very loose in this respect.

129. *Murder*.—By Robert II. c. 3, when a murder or manslaughter shall occur, an inquisition shall be taken as to whether it was voluntary or casual; and, if voluntary, justice shall be done; and, if casual, the offender shall have his lawful defences. Then (Id. c. 4) a fugitive manslayer may be banished after a warning of forty days, and his goods confiscated to the king or baron as escheat, and his lands confiscated for life to the use of the king or baron; and (Id. c. 9) if a manslayer flies to the church, and is warned to appear before the judge, and fails, he shall be exiled; and if it appeared that the slaughter was by chance-medley, the offender shall be restored to the church; but before he leaves the church he shall give security to the sheriff for his crime. This last enactment refers to the composition which, in such cases, fell to be paid to the representatives of the person who had been slain, and also to the fine which was payable to the king.

In the time of David II. a somewhat curious case arose. A husband punished his wife; and, in consequence, she refused to take food and died. Her relations charged the husband with the murder of his wife. The case was submitted to the king by the judges; and the king, by an assize (c. 16), declared that the husband who punished a wife with moderation for her correction was not guilty of her death, and the husband was accordingly pronounced innocent of the charge brought against him.

130. *Mutilation*.—He who is accused of mutilation, wounding, and beating, shall pass to an assize; and, if convicted, shall buy and redeem his life from the

judge, and satisfy the party injured (2 Robert II. c. 11).

131. *Theft*.—A thief in the early part of this epoch was tried by hot iron and water ; and, if he was found guilty, was hanged. By Alexander II. c. 13, a thief, or suspected one, who had no master or pledge, was condemned to death without further trial ; but, by Alexander II. c. 7, if one was challenged with theft, and had a master, he was to be tried by an assize, and not by hot iron or water. A statute (2 Robert I. c. 29) was also made that, if a thief was found breaking up a house in the night, and was wounded and died, he who had wounded him should not be guilty of his death ; and further, if the thief was wounded in the day and died, the offenders should be guilty of manslaughter.

The assize of David II. c. 3, leads to the conclusion that theft was often perpetrated against the poor, and remained unpunished. To put an end to this state of things, the king made a law that he who was poor and wanted help of all men should be under the king's protection ; and that where theft was committed against such a person, restitution was to be made to the king.

In the reign of Robert II. we are told of ketharans, or sorners, who are referred to in Robert II. c. 25, as persons travelling through the country and eating it up, and consuming the goods of the inhabitants. These ketharans were to be judged as rebels ; and if slain, no one was to be guilty of their death. The country having no regular police was liable to be over-run by gangs of wandering vagabonds, who preferred the fruits of plunder to those of honest labour.

132. *Using false weights.*—The practice of using false weights was known in Scotland in early times. By an assize of David II. it was ordered that the Caithness weight should be used, and he who used unequal weights was to be fined eight cows for his transgression. The offence here referred to was buying with a heavy weight, and selling with a light one. I believe there is a case on record of a dealer in Dundee having been fined for selling with a heavy one!

133. *Felony.*—Felony is any offence which was followed by the confiscation of the offender's property. Thus, by 2 Robert I. c. 21, if any one was taken for slaughter, or any other felony for which he should be imprisoned, he was dispossessed of his lands, tenements, and cattle, until convicted of the felony. As soon as the accused was apprehended, his goods were to be inventoried. If convicted, his goods, except the necessary expenses for himself and his family so long as he was in prison, remained with the king for a year and day; and if he was freed by an assize, all were to be restored to him. After the king's right of escheat, the lands and goods fell to the over-lord of the felon, and the lord retained the goods to his own use and the land for life.

134. *Principal and accessory.*—The principal offender shall be first tried, and, if acquitted, the person charged as accessory is to be discharged, and, if not, must pass to an assize (David II. c. 29).

As to husband and wife, who, by a fiction of the law, are supposed to be one and the same person, it was declared (David II. c. 16) that a wife was not obliged to accuse her husband, nor disclose his theft

or felony, because she has not power over herself. Further, the husband should not consent to the felony or trespass of his wife, nor yet the wife of the husband, and she should stay him as far as she could. If both were partakers in an offence, both should be partakers of the pain.

These laws as to felony, principal and accessory, husband and wife, exist to this day.

BURGH LAWS.

135. *The towns of Scotland become important: their origin.*—In the first epoch of this history there were no towns in Scotland of any great consequence; but in this second epoch numerous important villages, towns, royal burghs, and cities spring into existence. Some of these owe their origin to the impetus which had been given to trade throughout the country, and others to the desire to escape the oppression of the feudal aristocracy. But, in most instances, they were founded by the kings, the nobles, and the clergy; for wherever a royal or episcopal palace, a nobleman's castle, a cathedral or a monastery was built, there also the elements of a town were sure to be found. These cities and towns became the great centres of industry and freedom, civilization and refinement, and had their privileges secured to them by charters, with various degrees of liberty. The rise and progress of the towns of Europe form an important branch of the history of all the countries in the West. Their rights and duties, their functions and jurisdictions, will be pretty clearly understood by the laws which I shall now specify.

136. *Antiquity of burgh laws.*—Certain laws and constitutions were made for the government of burghs by David I. (1124-1153.) Their exact date is unknown; but they are referred to in the statute book at an early date (James III. c. 53).

137. *Some important and curious regulations.*—A burghess was bound to have a rood of land. For each rood in a burgh the king received five shillings as rent, and the burgesses had to swear that they would be faithful and true to the king, his bailies, and the community of the burgh. The jurisdiction in burghs extended to all pleas and quarrels within their bounds, except the king's pleas, which were reserved for the king's justiciar. If land within the burgh was held peaceably, without challenge, and was truly bought, a good title was acquired on the testimony of twelve men, unless a claim was made by a minor, by a person out of the realm or in prison. Burgesses alone were to carry on the trade of merchandise. Three head courts every year had to be held in the burgh, and the absent burgesses were fined. Neither provosts nor bailies could sell bread or ale, or sell anything in their houses. Women appear to have been the only, or at least the usual brewers, and they were obliged to make good ale, or be fined. Bailies were to be elected at the first head court after Michaelmas, and were to be faithful and of good fame by the common consent of the honest men of the burgh, and were to swear fidelity to the king and the indwellers of the burgh. The night watching of the burgh was to be done by a man deputed from each inhabited house. Thieves were rigorously punished

by the pillory, banishment, cutting off the ears, and hanging. Lands were bought and sold by actual or symbolical delivery in the presence of twelve men and one bailie. If all these thirteen witnesses were dead, then the right to the lands was decided by twelve men, who should speak to the narration of their fathers, or to whom they gave as much credence as to themselves. Things were to be sold by means of a borgh, or security. If a burgess had a foolish wife, and she committed some trespass, he was not bound to pay more than fourpence for her, unless he pleased, and "might correct her as a bairn within age!" Customs or town dues were either great or small. The former were payable to the king, and the latter to the town; and earls, barons, knights, and freeholders by charter were exempt from payment.

138. *Statutes of the Guildry*.—By the statutes of the guild, (society of merchants,) made by the mayor of Berwick in 1283 and 1284, relief was to be given to indigent brethren and their daughters; and the price of bread and ale was fixed. This latter regulation was very commonly made by the bailies of towns, and they also fixed the price of many other articles as well as the rate of wages to labourers and tradespeople. These regulations have long been in disuse.

THE LIBERTIES OF THE MEN OF GALLOWAY.

139.—*Charter of Robert I.*—These are mentioned oftener than once in the statute book, and are secured by a new charter of liberties in 1325 (*Vide* 2nd statutes of Robert I. c. 35). According to this charter, the Gallowegians were to be tried by a good and true

assize of their countrymen; were not to be obliged to make purgation or acquittance; the four pleas of the crown, as well as treason and the slaughter of strangers, were reserved (exempted); and when convicted by an assize, each was to pay the value of ten cows to the king for each indictment found; and where treason or the slaughter of strangers was perpetrated, the offender was to be in the king's will as to life and limb. These privileges evidently point to the rejection of singular battle in the judicial trials of the Gallogwegians.

140. *Summary.*—The subjects which we have considered in this lecture have been numerous and varied. I have touched upon the war of independence, and shewn when Scotland was finally acknowledged to be free from all subjection or vassalage to England. We have also seen the rise and some of the consequences of feudalism, and have laid bare the first indications of the causes which gradually changed the feudal court of the sovereign into the house of representatives of the nation. I have also briefly hinted at the internal organization of the king's palace and of the castles of the great nobles.

Still further, I have shewn in what manner the nation was protected from aggression both at home and abroad, and how justice was administered in the courts of the king, the great landowners, and the burgesses. I have also made special reference to some of the provisions which existed during this epoch for the protection of life and property, and the punishment of crimes. The trial by jury comes

more and more into use, and other and more ancient modes of judicial investigation fall into desuetude or are abrogated and repealed. Suretiships and mutual protection amongst individuals was then powerful for the maintenance of order. The aristocratic element, always strong in Scotland, was then, perhaps, stronger than at any other period of our history, and feudalism reached its highest point of glory.

The next epoch will embrace a period of still greater advance in the science of government, the rights of property, personal protection, and security; and, when we next meet, I hope to bring down my investigations to the end of the reign of James V., at which time the world began to be shaken by the mighty forces which brought about the reformation of the Church, and introduced new and potent influences into modern life and society.

LECTURE III.

FROM THE DECLINE OF FEUDALISM TO THE BEGINNING OF THE
REFORMATION OF THE CHURCH (1406 TO 1542).

THIRD EPOCH.—SCOTTISH—FIRST PERIOD.

RECAPITULATION OF LAST LECTURE.

141. *Historical survey.*—The condition of Scotland and its government will be best understood and most conveniently illustrated by a brief preliminary outline of the chief events of the reigns of this period. This I proceed to give.

142. *Reign of James I. : he curbs his factious nobles and subdues the Lord of the Isles.*—James I. ascended the throne in 1424, and was murdered in 1437. His murderers were put to death with a refinement of cruelty, which, although diabolical, was not unknown in the practice of this and other countries of Europe of that age. In his youth he was sent from Scotland to France with the view of escaping the machinations of his uncle the duke of Albany, and was taken prisoner by the English in 1406, and detained at the English court for eighteen years.

On his return to Scotland he found that the kingdom had suffered from misgovernment and internal disorder, and he bent his whole energies on the improvement and civilization of his people by passing many excellent laws, and resolutely enforcing them. He punished the factions of the nobles, and restrained their injustice and cruelty. Informed of the universal rapine and plunder which prevailed, he is said to have exclaimed : “ Let God but grant me life, and, by His help, I shall make the key keep the castle, and the furze bush the cow throughout my dominions, though I should lead the life of a dog to complete it.” He carried out his threat with a resolute determination, and perished in striving to govern his kingdom in justice and righteousness.

How his threat was executed may be imagined from some punishments, inflicted in his reign, which are mentioned by Balfour. Thus, in 1429, the king caused Macdonald Ross, a notorious thief and murderer, to be apprehended and shod with horses’ shoes of burning hot iron, and to be led in a halter about the town of Perth, and then, with twelve of his companions, to be hanged. This peculiar punishment was inflicted on Ross in consequence of his having acted in a similar fashion to a poor woman who complained to the king of his oppression. Take another instance from the same author in the year 1427. The king went to Dunstaffnage, ordered the chiefs and clans to meet him, and, after Donald Balloch had fled to Ireland and would not return, arraigned and sentenced three hundred of Donald’s clan to the gallows, and caused them all to be hanged.

The northern part of the realm as it now exists was completely subjected to the kings of Scotland by the destruction of the sovereignty of Donald of the Isles in 1427.

James I. was a statesman and a legislator, and acted upon the principle that the security of life and property are indispensable in a well-governed community. He largely succeeded in bringing his lawless subjects under the authority of the laws.

143. *Reign of James II. : he quelled the chronic state of disturbance in Scotland, and killed earl Douglas with his own hand.*—James II. was crowned in 1437, and died in 1460. Tytler, in his General History, says that he quelled the factions of his nobles by a barbarous rigour of authority, was beneficent and humane to his people, and contributed materially to their civilization and prosperity by his laws. At his father's death he was six years old, and his minority was characterised by interminable strife, faction, and bloodshed amongst the nobles. During these intestine feuds, William the fifth earl of Douglas was treacherously seized by the Lord Chancellor Sir William Crichton in the year 1440, and was beheaded without trial.

Not long afterwards (1452) the king himself, who had undertaken the management of public affairs, summoned the earl of Douglas to Stirling Castle, and enraged at him for his cruelty and oppression, his pride and arrogance, stabbed him to the heart. An assembly of the estates then declared the Douglas family to be enemies to the state, forfeited their lands, and forced them to fly for refuge to the English court. Thus was

the noble house of Douglas, holding vast territories in the richest districts of the kingdom, and rivalling, if not surpassing, the sovereigns in wealth, grandeur, and magnificence, levelled to the ground. It was never able to regain its former power and authority. The brother of the murdered earl, though expelled from his native country, involved James II. in a war with England; and the king was killed by the bursting of a cannon, in the twenty-ninth year of his age and twenty-fourth of his reign, while he was superintending the siege of Roxburgh castle, which had been in the hands of the English for upwards of a century. The castle surrendered, and was razed to the ground, and James III. was saluted king by the army.

144. *Reign of James III. : inveterate contests between the king and the nobles : Berwick finally lost.*—James III. was eight years old at his accession, and reigned twenty-eight years (1460-1488). He attempted to tread in the footsteps of his father and grandfather, but had neither their abilities nor their courage. He endeavoured to humble his barons by employing commoners in public affairs, and his turbulent nobles betook themselves to rebellion. He even excited the contempt and hatred of his own brothers, who revolted against him. He only succeeded in maintaining himself on the throne by taking away the life of one brother, the earl of Mar, and by a reconciliation with the other, the duke of Albany, and by temporarily giving the latter the most important office in the kingdom. He was indolent, fond of literature, and governed by favourites, who were sometimes seized, *e.g.* at Lauder Bridge, and

put to death almost before his eyes. In a war with England he lost the town and castle of Berwick, which has ever since belonged to the English; and somewhat later the malcontents, gaining the king's eldest son to their cause, defeated the royal army, and, in an attempt to escape from the field of battle, the king was mortally stabbed by an assassin.

145. *Reign of James IV.: the king married to the princess Margaret of England, and killed in 1513.*—James IV. succeeded his father at the age of sixteen, and was slain in the disastrous battle of Flodden, after a reign of twenty-five years (1488-1513). The barons who remained faithful to the late king James III. raised the standard of rebellion, but James IV. vanquished them, and, by his clemency, gained them over to his own government. His relations with his cotemporary Henry VII. were most unsatisfactory, and the endeavours of the English king to excite the disaffected Scottish nobles against him urged James to defend himself by hostile measures. In 1503 he married Henry's daughter the Princess Margaret; but this most auspicious alliance was not destined to bring a lasting peace till more than a century had passed away. Indeed, the king's nuptials had scarcely been celebrated for more than ten years when James and his brother-in-law Henry VIII. were at war, which ended in the destruction of the finest army which ever crossed the borders into England, and by the slaughter of the king himself and the flower of his nobility.

146. *Reign of James V.: the factions caused great disorder: the king allies himself with Germany and*

France: opposed to the reformation of the Church.—James V., an infant at his father's death, was proclaimed at the unusually early age of twelve, and his reign lasted twenty-nine years (1513-1542). Margaret, the queen dowager, lost the regency of the kingdom by marrying the earl of Angus. The young king and his brother, Alexander duke of Ross, were entrusted to the noble and clerical party, which was opposed to the English alliance. The whole country was divided between two factions, one of which, the English, was headed by Margaret and Angus; and the other, or the French, comprised the most of the nobles and the majority of the people. In 1515 the duke of Albany, the king's uncle, returned from France, and, amidst the acclamations of the people, assumed the office of regent, and evinced his hostility to England as decidedly as he ostentatiously displayed his devotion to France. One insurrection after another followed; offenders of the dominant party against the commonwealth were pardoned from weakness or policy; and others of the opposite, and, for a time, defeated faction were tried and executed as traitors. Albany went back to France in 1517, and Margaret re-assumed the office of regent; but the incessant scenes of uproar, confusion, and bloodshed in the streets of the capital proclaimed to the world that Scotland was destitute of a supreme government. Albany returned to Scotland in 1521, and found the country in a most deplorable condition from internal dissension and the intrigues and hostile attacks by Cardinal Wolsey and his master Henry VIII. The duke was able to effect nothing for the good of the

country, and in despair and disgust, he again returned to France.

In 1528 James freed himself from the Angus faction, forbade the Douglasses from his court, drove them across the border, and entered into an alliance with the emperor of Germany and the king of France. He determined, he said, to maintain in Scotland the religion of his forefathers. He married (1) Magdalen the daughter of Louis XII. and (2) Mary, sister to the duke of Guise. These matrimonial alliances, and the disturbances which had arisen in England in the progress of the Reformation, made James a sturdy opponent to the doctrines of the reformers. His latter days were checkered by disappointment and chagrin, and he died utterly disconsolate at the treatment which he had received at the hands of his haughty nobles and mutinous vassals. He died in the thirty-third year of his age, and only seven days after the birth of his still more unfortunate daughter Mary Queen of Scots.

Here I may not inappropriately interpose a few remarks on two or three subjects of a general character.

147. *Leagues for mutual defence.*—The state of the people during the whole of this period was most lamentable. The rebellions, murders, thefts, and oppression are hardly credible. The powers of the central government were annihilated, and the commons endured the most grievous and terrible wrongs. This gave rise to leagues and bands for mutual defence and protection; and, although powerless to repress the disorder, various laws were made declaring those leagues contrary to the public welfare (James I. p. 2.

c. 30 ; James II. p. 14. c. 27 ; James III. p. 3. c. 34, and p. 6. c. 87).

148. *Revocations of forfeited estates by the king.*—In the midst of this disorder, a great deal of landed and personal property was forfeited to the crown. Some of it was restored to those who had been deprived of it by their rebellion or opposition to the dominant faction ; some of it was conferred on the heirs of former owners ; and the remainder, though intended for the use of the king as the sovereign and representative of the people, found its way into the hands of the greedy and rapacious barons at court. These alienations caused frequent revocations to be made by the kings of Scotland on the ground of their minority and their coronation oath. These revocations were ratified by parliament. They were sometimes general in their terms, and at other times were executed under certain reservations as to particular individuals specially mentioned (*Vide* James II. p. 1. c. 2 ; James III. p. 9. c. 71 ; James IV. p. 1. c. 5 ; *Ib.* p. 2. c. 22 ; *Ib.* p. 2. c. 10 ; *Ib.* p. 4. c. 50 ; *Ib.* p. 4. c. 50 ; *Ib.* p. 4. c. 51 ; *Ib.* p. 6. c. 100 ; James V. c. 70).

149. *Scotland reaches its utmost extent.*—In the year 1468 James III. was married to a daughter of the king of Denmark. Amongst the arrangements made on the marriage was the renunciation by the Danish king of all rights claimed by him to Orkney and Zetland, and those islands have ever since been annexed to the Scottish kingdom. Since then no substantial modification has been made as to the extent of Scotland, unless as regards Berwick, which ultimately fell to England.

150. *One law for all Scotland.*—Nearly half a century before this consolidation took place, namely in 1425, all the king's lieges (3 James I. c. 48) were commanded to live and be governed by the laws of the realm. Thus came to an end that diversity of laws which existed throughout Scotland till that year, *e.g.* amongst the Gallowegians.

151. *Codification of law required.*—This order was a great step in the path of progress, and could not fail to be of the utmost advantage to the whole nation. The principle adopted by James has not reached its final development, and I hope to see a still greater uniformity in the laws of the whole of the United Kingdom, and especially in all matters of trade and commerce. The necessity for this uniformity is daily becoming more imperative, and its triumphant recognition ought to be urged forward by all parties in the state. By a fiction of law, no one is ignorant of its provisions; but, in numerous instances, the greatest obscurity exists. This should not be so, but, on the contrary, the law of the land ought to be clear and intelligible to all. Our wise and statesmanlike king James I. was keenly alive to the importance of this matter, and had a law passed by which six wise and discreet persons were to be chosen from each of the three estates of parliament, to see and examine the books of the law, and where necessary to amend them. Nothing was done under this act; but what was then desirable is now a hundred-fold more necessary. In some way or another the chaotic mass of our laws must be reduced to order and symmetry; and a code for Scotland might well prepare the way for one for the

whole of the United Kingdom and to some extent of the empire. This is a matter for the serious consideration, not only of parliament, but also of the people in general, and this is the reason why I give James's abortive attempt so much prominence here.

Let this suffice for our historical retrospect, and let us now consider the prerogatives of the king.

THE KING'S PREROGATIVES.

152. *Tendency to restrict them.*—The king's prerogatives were enunciated in my last lecture. They never exceeded those which I have there stated, and there has always been a tendency to restrict them. Thus the king's judicial power became vested in the college of justice; and restrictions were placed on the sovereign's power to dispose of the royal inheritance (1 James IV. c. 12, and 6 James IV. c. 90); and the sovereign right of granting pardons had, for a time, to be exercised with the approval of the king's secret or privy council, or of parliament. Again, how, if at all, the king had power to make laws for the whole nation is very doubtful, and the right, if ever exercised, was neither in accordance with the primitive institutions of our ancestors, nor sanctioned by the feudal lords, nor the community, at any period of our history.

153. *The king was the head of a feudal aristocracy.*—The Scottish king was the head or chief of a feudal aristocracy. He was himself a great feudal lord, whose vassals held the largest and richest territories in the country; and practically he was unable to carry on war or make peace without the concurrence of his vassals.

Indeed, in primitive times, all the land in Scotland belonged to chiefs or petty kings as the heads of their tribes, and guardianship for the tribe has gradually merged into absolute ownership. Military power and feudal legal conceptions have radically changed the ancient ideas of Europe about landed property; and centuries of feudalism, consecrated by prescription for many generations, have erected an indefeasible, individual property.

154. *Feudal hereditary offices condemned.*—A most important law was made in the reign of James II. in regard to the tenure of public offices. In Scotland, as in all the feudal countries of Europe, not only did our kings confer grants of land, subject to military service, fidelity, and allegiance, but they also bestowed upon their favourites all sorts of offices in the government by way of inheritance. Consequently sheriffships, constableships, and nearly all the offices about the king's person were given away in perpetuity to some particular family. Some of them exist to this day. This practice caused much injustice throughout the land, and was an evil which required to be speedily removed. A slight palliation was adopted by parliament in 1455 (11 James II. c. 44); but the evil was not uprooted till feudalism was abolished three hundred years afterwards.

155. *The royal revenue.*—This was chiefly derived from the royal domains, and from the services and casualties which arose out of the feudal system; but, in addition to this source, there were certain customs or dues leviable on various articles of trade and commerce, which were chiefly paid by the burghs, and

were usually fixed by use and wont, or by agreement between the traders and the officers of the king.

156. *Guardians of the realm frequently appointed.*—During this period, as I have already told you, guardians and regents of the kingdom were frequently appointed. These were chosen for various reasons, *e.g.* occasionally the king was mentally incapable of exercising his royal functions, and frequently he was in minority. These temporary sovereigns were elected or approved by parliament, and had such powers conferred upon them as the legislature thought proper. Sometimes a single person was entrusted with the royal authority, and at other times there were several. The frequent appointment of these regents, when the happiness of the people might have been more advanced by returning to the old practice of election, clearly shows that the rules of hereditary succession to the throne had taken deep root in the national mind; and subsequent events have demonstrated the wisdom of rigidly adhering to these rules, unless the sovereign had shown a decided and uncontrollable preference for absolute and independent authority rather than for the high power and dignity of a constitutional monarch, beloved by his people for his justice and clemency.

The governor, or temporary sovereign, was early restrained from disposing of the royal domains during his tenure of office (8 James I. c. 133); but the frequent revocations made on the king's majority prove that, in this matter, the law may be one thing and men's actions another.

157. *The king's consort.*—When James I. wished the oath which was given by his feudal vassals to him-

self to be sworn to the queen by the successors of prelates and the heirs of all his tenants, a statute had to be made for the purpose (8 James I. c. 109). This was a new obligation imposed on feudal property. From this statute we may infer that the existing feudal tenants gave an oath of fidelity and allegiance to the queen in the same terms as that given to the king.

All the queen-consorts were crowned, but their coronation did not confer any of the rights of sovereignty. It was a mere honorary ceremony and nothing more.

158. *The prince of Scotland was a petty sovereign.*

—The prince of Scotland was endowed with certain high privileges and prerogatives, that is to say, he had lands appropriated to him with the full rights of a sovereign in his own domains, *e.g.* a court, parliament, and officers of his own. Near the end of the fifteenth century his titles were—Duke of Rothesay, Earl of Carrick, Lord of Cunningham, and Steward of Scotland. In England there were several principalities, but in Scotland only one. All, or at least the most important, rights and privileges of the prince of Scotland would seem to have merged in the king when there was no prince. Thus, by James IV. p. 2. c. 16 (1489), all the free tenants of the prince, the Duke of Rothesay and Steward of Scotland, were bound to give suit and service in the king's parliament aye and until the king had a son who should be immediate between the king and them to answer for them in the king's parliament and justice ayres.

PARLIAMENT.

159. *Parliament organised.*—The great council of the nation was now completely organised. It was composed of the three estates, *i.e.* of the dignified clergy, the barons, and the representatives of the burgesses; and no law or great national act could be made or done without their consent.

Two exceptions.—(1.) In the reign of James II. a statute was made by the king “with consent of the clergy and barons.” This act restricts the persons who could be merchants, and declares that they must be men of substance and good fame, and freemen of burghs and indwellers within the same. This law operated as a monopoly, and might also have been dictated by a military spirit, which considered trading as derogatory to a gentleman. (2.) In 1513 a statute was made by the king “with the consent of the lords now in the king’s army,” and was a release from all ward, relief, and marriage due to the king, and was granted in favour of the heirs of those who then might be slain or might die in the king’s army (7 James IV. c. 102). This statute, which was in reality an agreement between the king and his tenants, was made a few days before the disastrous battle of Flodden. Both of these exceptions appear to show that the general idea upon which all the public statutes were then based was that they were made with the consent of those whose interests were involved, or of those who stood in the character of guardians and protectors of the rest of the community. The notion

of the public interest as distinct from the interest of those who were entitled to a place in the king's court did not then exist. This higher conception in its modern aspect was of later growth, and, in Scotland at least, was largely developed by the contests which sprung from the reformation of the Church.

160. *Attendance was enforced by fines.*—It must never be forgotten that the presence of the king's tenants in his royal court was as imperative as the right to be there was unquestionable. This is not at all surprising, for the great council of the nation was a court or assembly for deciding lawsuits as well as deliberating on matters involving the public welfare. By a statute of 1425 (3 James I. c. 52) all prelates, earls, barons, and freeholders of the king were bound to appear personally in parliament, and not by procurators, unless the latter proved a lawful cause of absence; for, says the statute, they were bound to give presence in the king's parliament and general council. This enactment clearly shows two things: (1.) attendance in parliament was obligatory on the king's tenants; and (2.) procurators or proxies might be appointed when a good excuse for absence from parliament could be given. The fine inflicted upon absentees was £10.

161. *Bishops and great lords to be specially summoned, and small freeholders to appoint commissioners who were to elect a common speaker.*—A vital alteration in the constitution was made by a statute of 7 James I. c. 101 (1427); but it was not till 1587 that the representation of counties was fully established as the law and practice of the realm.

The statute of James declares that all bishops, abbots, priors, dukes, earls, lords of parliament, and baronets shall be summoned to the king's great council by his special precept. The words "lords of parliament" in this statute refer to the great barons. In the fifteenth century lords of parliament, independent of the tenure of land, were unknown in Scotland, and none had a voice in the great council of the nation except those who were the king's tenants. The king's high officers of state might then, and for long afterwards, speak and give advice in parliament; but, unless they were freeholders of the king, and therefore entitled to seats in parliament in their own right, they could not vote on the questions before this high court. This statute also declares that the smaller barons and freeholders were released from personal attendance at the great council of the nation; and that, at the head court of each shire, and in proportion to the size of each sheriffdom, they were thenceforth to elect commissioners, who were to have the full power of the shires to hear, treat, and finally determine all causes to be proposed in parliament or general council, and that the commissioners were to have their expenses paid by those whom they represented. It also enacts that these commissioners were to elect a wise and expert man to be called the common speaker of the parliament, and he, and he alone, was to propose all and sundry needs and causes pertaining to the commissioners in the parliament or general council.

By 14 James II. c. 75 (1457), no tenant of the king holding less than £20 in land yearly was to be constrained to appear in parliament unless he was a baron.

or was specially commanded by the king's officer or writ. In 1503 another act (6 James IV. c. 78) was passed in terms somewhat similar to the last, but the annual value was raised to a hundred merks, and when the rent was more than that sum absentees were to be fined for non-attendance.

162. *Commissioners and headmen of burghs warned to appear at taxations.*—A statute of 6 James IV. c. 78 (1503), ordained that commissioners and headmen of burghs should be warned when taxations were to be imposed. This provision unquestionably refers to complaints which had been made by the burghs against taxes being imposed upon them in parliament in the absence of their commissioners, and did not confer a right on the headmen or magistrates of the burghs to sit in the king's court. Still, as the taxes granted to the king were settled very much by an agreement between the king and his subjects, it may have been found desirable to have the headmen as well as the commissioners of the burghs at the king's court when taxes were to be imposed. If this was the object of the law, as I believe it was, the commissioners, and not the headmen of the burghs, would alone have the power to vote. There can be no doubt whatever that the right to sit in the king's court was an incident of tenure, and the right of the royal burghs to be represented in the parliament was, long before this, frequently acknowledged. It is also worthy of observation that parliament was in those days considered a burden, and somewhat in the same light as attendance on circuit courts now, and the laws which were made for compelling attendance

at its meetings were neglected, or complied with as seldom as possible. It was not till a much later date that the representation in parliament became an object of ambition amongst the commons, who did not then have the power they now possess, but were swamped or overawed by the great lords and their followers. All the power, glory, and emolument of the state were then in the hands of the king, and distributed by him amongst his noblemen.

163. *The parliament's judicial functions merged in the college of justice.*—During this period the parliament exercised judicial functions, both civil and criminal. This was sometimes done in full parliament, and sometimes by a committee or commission chosen from its members. One of these committees was designated as the lords auditors of causes and complaints in parliament, and in 1478 was composed of three clerics, three barons, and three burgesses. The lords auditors decided matters of fact and law by way of appeal from the judge ordinary. Here I may give an example of the way in which parliament intervened in lawsuits, and in which the legislature not only decided disputes, but laid down the law for the first time. A doubt having arisen in the court of session, not the college of justice, as to the person who was entitled to the life-rent escheat of a vassal who had been a year and day at the horn, it was referred to parliament, of which the court of session was then a committee (1528), and parliament decided that the life-rent should belong to the immediate vassal (3 James V. c. 32).

THE ARMY OR MILITIA.

164. *Regular weapon-showings held.*—Between 1406 and 1542 numerous regulations were made by parliament as to the army, or, since there was no regular standing army, I should rather say, the militia. These have reference to the times for holding weapon-showings. At these meetings the armour of the citizens was to be shown to be in accordance with their age and rent or substance; for all men, according to their age and ability, were bound to aid in the defence of the kingdom. The military forces of those days were entirely local, and were embued with that esprit de corps which our great military authorities wish again to see cultivated to the utmost. They were commanded by captains elected, for the several parishes, by the king's commissioners, the sheriffs, and territorial authorities (1 James I. c. 18; 2 James I. c. 44; 3 James I. c. 60; 12 James III. c. 89; 6 James V. c. 88 and 91; and 2 James V. c. 94).

THE CHURCH.

165. *The pope head of the Scottish Church.*—The pope was in presence of the king acknowledged to be the head of the Scottish Church, and obedience to him was accordingly sworn by the Scottish clergy in 1444. Soon afterwards (in 1471) the diocese of St. Andrews was raised to the dignity of an archbishopric by a bull of the pope; and in 1492 Glasgow received the same honour.

166. *Vacant benefices must not be obtained or purchased from the pope.*—As early as 1466 (1 James III. c. 3 and 4) a statute was made by which no commendams or benefices were to be purchased; and, on the preamble that many persons went to Rome to purchase benefices contrary to the laws of Scotland, another statute was passed in 1494 (5 James IV. c. 53) commanding that, under the pain of rebellion, no spiritual or temporal lords without the king's license should have any money sent to them out of the realm. In 1471 it was also enacted (6 James III. c. 43) that no clerks should purchase at Rome any benefice or the office of the pope's collector, and that no higher taxes should be levied for the pope than according to the old laws, that is to say, by Bajmont's Roll, which was made up about 1275 for the collection of the tenth of ecclesiastical benefices for the relief of the Holy Land. The papal usurpations had no bounds, and the pope having claimed the right of giving presentations to all vacant benefices during the vacancy of any diocese, the parliament repudiated his claim; and, by 11 James III. c. 84, 1481, enacted that the king should present to all benefices when a see was vacant.

James III. was also obliged to assert the rights of the crown against the encroachments of the clergy. Take this as an instance. The abbot of Dunfermline died in 1474. The monks chose Alexander Thomson as his successor, but the king abrogated the election, promoted the abbot of Paisley to the abbacy of Dunfermline, and made Robert Shaw the new abbot of Paisley. After a good deal of disputation the pope ultimately confirmed the king's appointment.

During the reign of James IV. violent disputes arose with the pope as to ecclesiastics going to Rome, and receiving presentations to benefices, and thus depriving the patrons of their church livings, causing disturbances, and violating the constitution of Scotland. The papal encroachments, and the practice of taking litigations to Rome, were condemned and denounced by the king. In fact, the intolerant bigotry and profound ignorance of the clergy, the exorbitant demands and usurpations of the pope, were urging forward an European crisis, which was destined to overthrow kingdoms, and shake the Church of Rome to its foundations. Upon this subject I can say nothing more at present, and will therefore ask your attention to the subject of church discipline, which, although it might be considered under the head of crimes, will, I think, be more conveniently disposed of here. I shall confine my observations to heresy.

167. *Church discipline: heresy.*—By *Reg. Maj.* heretics were to be burned (IV. c. 53); and by an act of James I. 1424, c. 3, or nearly one hundred and fifty years before the Reformation in Germany, it was declared that every bishop was to cause inquiry to be made as to persons holding heretical doctrines; that heretics were to be punished by the law of the Church; and that the secular power should assist the spiritual in carrying out the sentence. The trial of Dean Forrest, vicar of Dollar, may be taken as illustrative of the offence comprehended under the charge of heresy, and of the incapacity of the ignorant bishops to deal with this offence (*Vide* Pitscottie's History,

and also Pitcairn's Criminal Trials, 1538-9, p. 214). This trial gave rise to the well-known saying: "Ye are like the bishop of Dunkeld, that knew neither the new nor the old law."

James V., as I have already said, was a staunch upholder of the pope's authority, and, as far as he could, was determined to uproot the new religious doctrines which were rapidly spreading among the people. He rigorously enforced the laws against heretics, was himself present at the burning of some of his own subjects who had been condemned to the stake and had refused to recant, and even went as far as to say that he would not spare his own son from the wrath of the Church.

In 1528 Patrick Hamilton was burned at St. Andrews for holding the new religious doctrines. Little is positively known about the circumstances of his trial; but his opinions were much the same as those soon afterwards adopted throughout Scotland. Then, in 1534, Norman Gourlay was burned for denying the existence of purgatory and asserting that the pope was no bishop, but antichrist, and had no jurisdiction in Scotland. Further, in 1538, four of the clergy and one layman were burned in Edinburgh as chief heretics and teachers of heresy, and were not allowed the benefit of recantation,—a benefit which was usually accorded to all, and of which many who were charged with similar offences fully availed themselves. Amongst the charges made against these five wretched men was the crime of being present and eating flesh in Lent at the bridal of the priest or vicar of Tulliebodie. Many persons were also found guilty in 1538-9 of using books which defended doctrines that

had been condemned as heretical. The using of such books was an offence created by the king's proclamation, and shows how completely the civil power was used for the extirpation of opinions which were afterwards adopted as the basis of our civil and religious rights.

THE ADMINISTRATION OF JUSTICE.

168. *Co-ordinate jurisdiction of the lord chancellor and a committee of parliament, and of the king and council.*—In 1425 (3 James I. c. 65) it was enacted that the lord chancellor and certain discreet persons of the three estates should be chosen to examine, conclude, and finally determine all and sundry complaints, causes, and quarrels then determinable before the king and his council. They were to sit where the king wished them, and their court was called the court of the lords of session. Their jurisdiction was extended in 1457 (14 James II. c. 61) to all spoliations of tacks and mails, obligations and contracts, debates and other civil actions, which did not concern the fee or heritage; but, at the same time, the pursuers might bring their actions before the judges-ordinary. By 14 James II. c. 62, the decisions of the lords of session were declared to be final, without any appeal to the king or parliament. Moreover, the court was to be maintained out of the unlaws of the court (3 James I. c. 65, and 14 James II. c. 63); for it was then and long afterwards thought that courts, if not profitable, as they often were, should at all events be self-supporting.

169. *The king's daily council had co-ordinate jurisdiction with the lords of session.*—Another court was established in 1503 to dispose of the numerous complaints made to parliament. The statute which authorises this court to be erected empowers the king to choose a council, which should sit continually in Edinburgh, or where the king resides, to decide daily all summonses in civil matters, complaints, and causes as they should occur, and confers upon it the same powers as the lords of session possessed (James IV. c. 58).

Thus we have two courts co-ordinate to the king's council, for deciding the civil causes which were frequently brought before parliament, established to advance the ends of justice, and relieve the parliament of work for which, in full assembly, there was no time to deal. As early as 1426 a right conception of justice was taking deep root in the minds of our legislators, who were beginning to feel the importance of disposing of complaints according to fixed and acknowledged rules. It was therefore declared (1 James I. c. 83) that those who were chosen to decide the causes and complaints coming before parliament should swear faithfully and legally to give their decision without favour or hatred, without guile or deceit.

170. *The court of the king and his council.*—From what has been already said, it may be perceived that the king and his council exercised judicial powers. This state of things was a remnant of the old conceptions as to the king being not only a legislator but a judge, and was ever changing in extent and was almost impossible to define. It is interesting, however, to

notice that a reported case in 1525 as to a ship belonging to Amsterdam, decided by the lords of the council, shews that the king and his council had jurisdiction in cases of a maritime nature.

171. *The college of justice established as the supreme civil court.*—The college of justice in Scotland was framed after the model of the parliament of Paris, and was instituted by James V. in 1537. The establishment of this court by the king, and the confirmation thereof by the pope, were sanctioned by parliament in 1540 (7 James V. c. 48).

Its jurisdiction extended to all civil actions ; and as its decrees were to have the same effect as those of the lords of session, there was no appeal from its decisions to any other or higher tribunal. At its original foundation it consisted of a president and fourteen judges, and of the latter one half were clergymen and the other half laymen. The lord chancellor, if in court, was to preside, and three or four of the great council might be empowered by the king to vote. The quorum was to consist of the president and ten members. Rules of court were to be made, and confirmed by the king as far as they conformed to reason, justice, and equity.

The college of justice has been in existence for more than three centuries, and, modified so as to bring it into harmony with modern requirements, it has admirably fulfilled the intentions of its founder.

172. *Regulations as to the justiciar's court.*—For the regulation of the justiciar's court there were several acts passed in this period, and all of them insist upon the court being held twice a year, namely,

3 James II. c. 5 (1440); 13 James III. c. 98 (1483); and 3 James IV. c. 29 (1491). At its sittings, called justice ayres, the lords, barons, and freeholders were bound to answer for their vassals and dependents as often as necessary (3 James V. c. 6, 1528).

173. *The sheriff courts.*—By 8 James I. c. 130 (1429), freeholders and their attorneys are ordered to be present at the sheriff's courts; by 5 James V. c. 71 (1540), all sheriffs, stewards, and bailies were to be personally present at three head courts every year, and when they gave no lawful excuse for their absence they were to be amerced; and by 6 James V. c. 73 (1540), the deputies of sheriffs and others of the king's officers shall be good and substantial men, for whom their principals shall be responsible.

174. *Application for redress to be first made to the judge-ordinary.*—About the beginning of the fifteenth century, the judicial administration of the country seems to have been in a most unsatisfactory condition, and numerous applications for legal redress were made to parliament. This caused a statute to be made in 1424 (2 James I. c. 45) by which all applications should be first made to the ordinary judges, *i.e.* to the justiciars, sheriffs, stewards, bailies, and barons, provost and bailies of burghs, who were bound to give justice to all under pain of punishment, and the poor were to have advocates assigned to them to conduct their suits. This law did not effectually prevent parliament from being unnecessarily troubled with questions as to legal redress; for an act had to be passed in 1475 (8 James III. c. 62) again declaring that all complaints should in the first instance be made to the ordinary judges.

175. *Juries or assizes*.—With regard to juries there are various regulations and customs in the statute book and trials of the period. Thus, jurymen in a criminal trial were sometimes eleven, twelve, thirteen, fifteen, and more in number; all jurymen were fined when they did not enter an appearance in terms of their summons; they were to swear that they had not received any gifts, 13 James I. c. 138 (1436); where there was wilful or ignorant error by assizers, complaint was to be made to the king and his council, the error reduced, and the assizers punished as laid down in the *Regiam Majestatem*, 6 James III. c. 47 (1471); assizers in criminal causes were, on their confession of falsehood to the king and his council, to be punished according to law; and if they denied the charge of false assizers, they were to be tried by a jury of thirty men, and the accused person tried again, 8 James III. c. 63 (1475). These inquiries as to the conduct of juries have long been laid aside, and other means adopted to prevent injustice by the blunders, wilful or otherwise, of a jury. In the time of James III. and James IV. the trial of all causes by jury still prevailed in the court of the justiciar, and, indeed, in all the courts of the country, and the lords auditors frequently sent issues to be tried by juries in other courts. For instance, in 1471 the lords auditors sent issues to be tried by the sheriff, or other judge ordinary, before an inquest or jury as to certain mills being built on the lands of Ballerno or on the lands of the laird of Ruthven. In another case before the lords auditors in 1493, the sheriff and his deputies are charged to summon certain persons of the best

and worthiest of the county, and the least suspected of any prejudice, to the number of thirty, to compare before their lordships in order to pass upon the inquest to see how, &c.

Considering how long I have detained you, I shall be as brief upon the laws of this period as perspicuity will allow.

LAWS, CIVIL AND CRIMINAL.

First—Civil.

176. *The king and all freeholders may set land in feu farm.*—In 1457 it was made lawful for the king, lords, prelates, barons, and freeholders to set their lands in feu farm; and it was declared in 1503 that this right was to be on condition that the power to feu was exercised during life, and that the annual rent was not thereby diminished (14 James II. c. 71, and 6 James IV. c. 91).

These two statutes clearly point to the decay of feudalism, and the conversion of military services into money payments. They would also greatly increase the value of land; for alienation in feu farm was a violation of the feudal system and a frequent ground of forfeiture.

177. *Buyers of land to keep the tacks.*—For the safety and favour of poor people who tilled the ground, and all others who had taken, or should take, leases for a definite period of years, the buyers of land are bound, 6 James II. c. 18 (1449), to keep the tacks in existence before the purchase.

178. *Redemption of reversions*.—By 5 James III. c. 27 (1469), it was enacted that rights of reversion affecting land might be redeemed by the first seller from the first buyer, or any other possessor, when reversions were taken and duly registered.

179. *Distrain of plough utensils*.—By 6 James IV. c. 98 (1503), it is enacted that, where there are other things on the ground, no sheriffs or other officers were to distrain or poind anything belonging to the plough in the time of tilling.

180. *Tenants and their lord's debts*.—Inasmuch, says 5 James III. c. 36 (1469), as poor tenants are by brieve of distress liable to have all their goods seized for their lord's debts, they shall thenceforth not be obliged to pay more for such debts than their term's mail or rent.

181. *Ratification by a married woman*.—Doubts having arisen as to the effect of a ratification of a conveyance of land by a married woman who was conjunct fiar, they were put at rest in 1481 by a statute (11 James III. c. 83) declaring that, after she gave her faith to such a deed, she should never be heard against the alienation.

182. *Prescription*.—By two statutes passed in 1469 and 1474 (5 James III. c. 28, and 7 James III. c. 54) it was enacted that all obligations must be enforced by legal process within forty years, or be prescribed; if not pursued within forty years, they become void.

183. *Intestacy*.—The bishops-ordinaries having adopted a rule by which the distribution of the estates of intestate minors became very much at their absolute disposal, the legislature interposed, and enacted

that the nearest of kin should have the goods of those minors who died intestate. The ordinaries were the substitutes of the bishops, who, very probably under the guise of religion, were endeavouring to obtain full control over such estates.

184. *Regular and irregular marriages.* — The solemnities required in the celebration of a regular marriage are set forth in the canons of Perth, made in 1264. From these canons we learn that marriage was prohibited unless three solemn announcements were first made in the church or churches of the parish or parishes where the parties dwelt, and could not be contracted unless before faithful and legal witnesses.

The latter part of this law is founded on reason and good sense, but the former is now useless for the object which was intended to be accomplished, and ought therefore to be abolished, and some other means of giving publicity substituted in its place. (*Vide* statute of 1878.)

Second—Criminal.

185. *Treason.*—In 1424 it was declared that no man should openly or notoriously rebel against the king's person under the pain of forfeiture of life, lands, and goods (1 James I. c. 3); that all should assist the king to punish rebels under the pain of being charged by the king as favourers (*Id.* c. 4); and that receivers of rebels should suffer forfeiture (*Id.* c. 37). The acts of 6 James II. c. 14 and 15 (1449) also laid down that rebels should be punished according to the quantity and

quality of their offence, and their comforters, councillors, or maintainers punished as principals.

It was also solemnly decided in parliament in 1540 that an heir should suffer forfeiture for treason which was committed by his predecessor. This is another instance of parliament intervening and giving judgment upon a point of law in a suit pending in a court of justice. It arose out of a summons for forfeiture because of an ancestor's treason. Whereupon, as we are told, murmurs arose; parliament was appealed to, and the point decided as I have said; and it is expressly stated that this was done even although there was no special law, act, or provision of the realm on the subject.

In the reign of James V. a charge was brought against Lady Glammiss for conspiring to take away the king's life by poison, and against her son and her second husband for concealing the offence. She made a noble defence at her trial, and the judges felt ashamed to condemn her; but, being bent on her destruction as one of the Douglas family, the king was inexorable, and she fell a victim to the king's barbarous cruelty. She was burned; and her husband, who was also condemned, was killed in attempting to escape from Edinburgh Castle. Her son was also condemned, but was released in the succeeding reign, and his estates restored to him by the legislature. It is popularly supposed that Lady Glammiss suffered death for witchcraft. An examination of the original documents proves this supposition to be a popular delusion.

186. *Wilful burning and rape made treason.*—A statute of 3 James V. c. 8 (1528) enacts that all persons

guilty of wilful burning and fire-raising and ravishing of women should be compelled to give security as for slaughter, and if no security was given, be denounced rebels. 7 James V. c. 118, enacts that burners of corn in barns or stacks were to be justified, *i.e.* sentenced to death, or be banished for ever, and no remission of the offence was to be granted.

187. *Beggars and idle men.*—For the first time we come into contact with statutory provisions as to beggars and idlers. Those to be here noticed were made in 1424 and 1503. The former statute declares that no thiggers between fourteen and seventy shall be allowed to beg, unless they have “tokens” from the sheriffs or the council of burghs. Those who went about begging in contravention of this act were to be charged to betake themselves to crafts under the pain of burning on the cheek and banishment from the country. The latter statute declares that the act of 1424 shall be enforced, and then goes on to state that the sheriff, provost, and bailies were not to allow any to beg, except cruiked folk, sick folk, impotent folk, and weak folk, under pain of one merk for every beggar found within their respective jurisdictions. This enumeration of excepted persons gives a list of those who were afterwards entitled to parochial relief.

188. *Game.*—On the vexed question of game I find a statute in 1424 by which those who slew deer were to be fined 40s. and their maintainers £10; and inquisition was to be made by the justice clerk for such offenders.

189. *Summary.*—Let me now sum up the results of this lecture. First, The nobles have been seen to be exceedingly factious and ungovernable, and the state of the country wretched and deplorable. Second, A period has been reached when the country attained its present limits, and in which one body of law was applicable to all the king's subjects. Third, The means by which the government was conducted has been further developed, the modifications made in the legislature indicated, and the functions of the king and the college of justice explained. Lastly, I have referred to a few of the laws which were made in the period under review, and have noticed one or two illustrative decisions.

Looking at the whole, there are two observations which cannot escape the attentive observer of these times: first, the great body of the people—the nation as a whole as opposed to the nobles—have become a great power in the state; and second, a great and terrible religious crisis is at hand.

LECTURE IV.

FROM THE BEGINNING OF THE REFORMATION OF THE CHURCH
TO THE GREAT REVOLUTION (1542-1688).

THIRD EPOCH.—SCOTTISH—SECOND PERIOD.

HISTORICAL SURVEY.

190. *Meagre outline given.*—To give a history of Scotland does not lie within my province nor the scope of my design ; for the subject which I have in view is to shew what were the laws and legal institutions of our country at different periods, and I therefore assume an acquaintance with the common facts of Scottish history. I shall therefore not trouble you with more than the merest outline of the chief events of this period.

191. *Reign of Mary.*—All are familiar with the rejoicings on the return of Mary from France to Scotland ; her attachment to the Roman Catholic faith ; Darnley's murder near Edinburgh ; the queen's disgraceful marriage with Bothwell ; her abdication, escape from Lochleven, defeat at Langside, flight to England, long imprisonment of eighteen years, and death on the scaffold in 1586.

192. *Reign of James VI.*—James VI. may be said to have been king from 1567 to 1625, but he was quite an infant when his mother fled to England. During his minority Murray, Lennox, Mar, and Morton were regents. He took the reins of government into his own hands on Morton's death, and a long period of discord amongst the nobles was followed by one of comparative peacefulness. The Gowrie conspiracy, however, is evidence of the calamitous weakness of the monarchy, and of the power, audacity, and recklessness of the aristocracy; and the perpetual feuds and disturbances among the Highland chiefs reveal great anarchy and confusion in the northern regions of the kingdom.

The Reformation of the Scottish Church gave rise to many fierce quarrels, and the king was soon taught that the clergy of the new doctrines contended for privileges and immunities as great and as subversive of civil government as those claimed by the priests of Rome. Some of the phases of the Reformation I pass over till a later stage of this lecture. With regard to the lands and great revenues of the old church I may mention that, although they were annexed to the crown, they were speedily and greedily swallowed up by the king's favourites.

On Elizabeth's death in 1603, James removed to England; and the union of the crowns of Scotland and England under one sovereign was at last accomplished. The king did much and laboured hard to bring about an entire incorporating union of the two countries; but, in consequence of the national antipathies which had long existed, he did not succeed. As a necessary con-

sequence of the king's accession to the English throne, it was decided by the English courts, in the celebrated case of the "Postnati," that persons born in Scotland after the accession of James VI. were entitled to succeed to land situated in England.

193. *Reign of Charles I.*—Charles I. succeeded his father in 1625. He visited Scotland in 1633; and in 1637, by royal proclamation, the liturgy, drawn up under the eye of archbishop Laud for the use of the Church of Scotland, was ordered to be adopted. The attempt to enforce the king's command as to this matter caused serious riots in Edinburgh; and then, in rapid succession, came the solemn League and Covenant, signed in Scotland in 1638 for the maintenance of the Presbyterian form of worship, and in opposition to Episcopacy, which had been re-established by James in 1606; the beginning of the Civil War in 1642; the king's defeat at Naseby in 1645; and his execution in 1649. These events were followed by the Commonwealth of England; the protectorate of Cromwell in 1654; the restoration of the Stuart family in 1660; and the defeat of the Scottish Covenanters at the Pentland Hills in 1666 and at Bothwell Bridge in 1679.

194. *Reign of James VII.*—The brief reign of James VII. began in 1685. Shortly after his accession he issued his declaration of toleration, and assertion of absolute sovereign power; but the estates of the Scottish parliament held he had no such power, declared his forfeiture of the throne, and conferred the crown upon the Prince and Princess of Orange, and their issue; whom failing, the Princess Anne and her issue; and

whom failing, William and his heirs. Here we have the first steps which led to the exclusion of Roman Catholic princes from the British throne, and to the Protestantism of the sovereign being made a cardinal doctrine of the British constitution.

195. *Regencies*.—From 1542 to 1561, and from 1567 to 1578, Scotland was governed by regents, who were invested with all the powers of the sovereign. The regents were chosen by the estates of parliament, and little deference was paid to the wishes of a defunct king in the appointment of those who were elected to this high office.

196. *The coronation oath of James VI.*—At the coronation of James VI. on 29th July 1567, the king was about one year old, and a special oath was framed and taken by the earl of Morton on his behalf. This oath contained a promise to maintain religion, do justice, punish heretics, and preserve the crown property. On the other hand, the representatives of parliament swore that they would give due and lawful homage and obedience to the king.

THE ROYAL PREROGATIVES.

197. *The sovereignty limited*.—The sovereigns of Scotland never had, by their own authority, any constitutional power to make laws. Some have asserted that the kings of Scotland had no legal power to refuse to accept the resolutions of the three estates; and others have held that a majority of each estate was required for the making of a new law; but, although

the king's right of veto in parliament was not finally settled till after the Union, I do not agree with either of these opinions. The legislative power in Scotland was entrusted, from the earliest times, to the king and his tenants-in-chief.

In 1584 (8 James VI. c. 129) an act was passed by which the king's royal power over all estates and subjects within the realm was confirmed. The words are "confirms the royal power and authority over all estates spiritual and temporal within this realm in the person of the king's majesty our sovereign lord, his heirs and successors." This language, however, applies to the attempted rejection of the jurisdiction of the king and his council as to seditious speeches, and does not apply to an absolute, despotic right to govern the people. Indeed, in 1567 (1 James VI. c. 8) it is expressly laid down that the king shall rule his people according to God's word and the laws of the land. Again, in 1606 (18 James VI. c. 1) it is declared that his majesty, with the advice of his whole estates, ratifies, approves, and perpetually confirms his majesty's sovereign authority, princely power, royal prerogatives, and privileges of his crown, over all estates, persons, and causes whomsoever within his kingdom of Scotland, as absolutely and freely in all respects and considerations as ever his majesty or any of his royal progenitors kings of Scotland in any time bygone possessed, used, and exercised the same.

198. *The sovereign appoints officers of state, privy counsellors, and lords of session.*—From the earliest times the Scottish kings were assisted by various officials in the performance of their royal functions. I have

already referred to several of these state officials, such as the lord chancellor, justiciar, and others. I have now to add that he was also surrounded by a council, which aided him in the discharge of his administrative or executive duties. The frequent references which are made to this body in the statute book show that its duties were exceedingly multifarious. Indeed, in some cases it is declared that no act shall be done by the king or regent unless sanctioned by a council chosen by the estates of parliament, *e.g.* James VI. parlt. 16. c. 4 (bullion), and 20, c. 14 (resignations and confirmations), and 23, c. 19 (prices of writs); Charles I. p. 1. c. 25 (penalties in J.P. court); Charles II. p. 2. session 1. c. 15 (price of ale, &c.); Charles II. p. 2. s. 1. c. 16 (bridges, &c.); James IV. p. 2. c. 12 (council to king).

In 1661 (sess. 1. c. 2) the estates of parliament acknowledged that it was an inherent privilege of the crown, and an undoubted part of the royal prerogative of the kings of the realm, to have the sole choice and appointment of the officers of state and privy councillors and the nomination of the lords of session as in former times preceding the year 1637.

199. *He calls, prorogues, and dissolves parliament.*—By a statute also passed in 1661 (c. 3) it is declared that the power of calling, holding, proroguing, and dissolving parliaments and conventions of estates resides solely in the king and his heirs and successors; and that no parliament can be kept without the special warrants and presence of the king, or his commissioners, nor any act or statute thereof binding without his special authority and approbation inter-

poned thereto ; and that none impugn or act to the contrary under the pain of treason.

The rights asserted in this act harmonize with the theory of our constitution from the earliest times.

200. *His powers as to peace and war.*—I have no hesitation in saying that, by the constitution of Scotland, the right of making peace and war, treaties and leagues with foreign princes and states, belonged to the king conjointly with his estates in parliament. This, as you are aware, was not the law in England ; and this is one of the points in which a new principle was engrafted on the Scottish constitution by the union of Scotland with the sister country. As every one knows, however, the responsibility for peace or declaring war, and for making foreign treaties, rests upon the shoulders of the Queen's cabinet ministers, who are now virtually and essentially a committee of both Houses of Parliament, and who can hardly do a single act without the support of a majority of both Houses of Parliament, and more especially of the House of Commons, who act as the guardians and defenders of the national resources. Indirectly, therefore, the Lords and Commons can put an end to warlike operations ; but the opportunity of exercising this power often arrives too late.

The words of the statute of 1661 (c. 5) as to peace and war are to this effect : The estates of parliament declare that the power of arms and of making peace and war, or treaties and leagues with foreign princes or estates, doth properly reside in the king's majesty, his heirs and successors ; and that it was and is their undoubted right, and theirs alone, to have the

power of raising, in arms, the subjects of the kingdom, and commanding, ordering, and disbanding or otherwise disposing thereof, and of all strengths, forts, and garrisons within the same, as he shall think fit; and that the king's subjects shall always be free of the provisions and maintenance of these forts and armies, unless the same shall be concluded in the parliament or convention of estates. Those who violate this act are guilty of high treason.

201. *The king and his deputed may decide all causes.*—There can be no doubt that the prerogatives of the crown were greatly enlarged on the restoration of the Stuart dynasty. Thus, *e.g.* it was declared by the estates of parliament in 1681 (3 Charles II. c. 18) that, notwithstanding jurisdictions and offices may have been bestowed by the king, his sacred majesty might, by himself, or any commanded by him, take cognisance of any case or causes which he pleased.

This statute was a dangerous acknowledgment, unrecognised in the country for centuries past, wholly despotic in its nature, and fraught with terrible calamities to a free and high-spirited people.

PARLIAMENT.

202. *The clergy as such finally excluded from parliament.*—You will remember that I have already told you that the estates of parliament consisted of the dignified clergy, the greater barons, and the commissioners of counties and burghs. In consequence, however, of the changes which happened at and sub-

sequent to the Reformation, the Church occasionally was not specially represented in the great council of the nation, and at last was completely excluded from all direct representation in the king's parliament. This latter state of matters may be fixed as having taken place on the final establishment of Presbyterianism in the reign of Charles II. When the doctrines of the Reformation were adopted, this exclusion was neither intended nor anticipated. For some time after the supreme authority of the pope in church matters had been overthrown in this country, there was a vacillation between the Presbyterian and Episcopal forms of church government. When Episcopacy was in force the bishops had seats in parliament; but, by the lay impropriations of the church lands, the prelates were shorn of their former wealth and lustre. Indeed, from the time of the Reformation the episcopal order virtually ceased to have any influence on the affairs of the nation. Still, I ought to say that in 1597 (15 James VI. c. 235) it was enacted that all pastors and ministers upon whom the king conferred the office, place, title, and dignity of a bishop, abbot, or other prelate was to have a vote in parliament as fully as any ecclesiastical prelate had in any time theretofore. Three years afterwards, the Presbyterian Church passed a resolution that it might be represented in parliament by certain of its members chosen by the king, and that they were to resign their power to the general assembly of the Church every year.

203. *Creation of peers.*—With regard to the greater barons, the right to sit in parliament became

less than ever based on tenure of land, and more on titles conferred by the sovereign as the fountain of honour. The result of this has been that there is not a single nobleman in Scotland entitled to a seat in parliament by virtue of tenure, that is to say, by his holding land immediately and directly from the crown, and there is only one English nobleman who can make even a plausible claim to a seat in the British House of Lords by virtue of his title to a landed estate. One mode of conferring an hereditary peerage was by the king issuing a writ commanding one of his subjects to appear in parliament, and by this summons being followed by the actual presence of such person in the high court of parliament. If he never took his seat, neither he nor his heirs were entitled to the honours of the peerage. Another mode was by the issuing of royal letters patent conferring the rights of the peerage upon the patentee and his heirs.

204. *Peers could nominate proxies.*—An act was passed in 1617 (22 James VI. c. 7) declaring that any lord of parliament, who was lawfully excused for absence from parliament, might give power to another lord of parliament of the same estate as himself to reason and vote for him. This statute did not extend to commissioners of shires or burghs.

205. *Life peers in Scotland.*—That there were life peers in the Scottish parliament is not to be doubted. For example, the earl of Athole was made earl of Strathern for life in 1427; the earl of Crawford made duke of Montrose for life in 1489; the lord Douglas made duke of Hamilton for life in 1666; Sir Walter

Scott made earl of Tarras for life in 1660; and Francis Abercromby made lord Glassford for life in 1685. It ought to be observed that only one of those life peers was a simple commoner.

206. *The British House of Lords must either surrender its appellate jurisdiction or allow judicial life peers to be created.*—Life peers, except bishops of the English Church, have been, in recent times, declared by the House of Lords to be opposed to the laws now existing as to parliament; but how far this resolution ought to remain a part of the constitution is extremely doubtful, and might, with advantage to the interests of the nation, be again discussed. For my own part, I can see no objection to the highest officials of the state, whether judges of the supreme court, or high executive and military officers, at home or abroad, being placed in the same position as the great dignitaries of the English Church. It is perfectly clear that, if the House of Lords is to continue as the supreme court of appeal in civil causes, some measures must be adopted to obtain the highest legal talent of the country without compelling the appellate judges to be burdened with the serious responsibilities of the hereditary peerage. The truth is, the legislature must adopt one or other of two courses, namely, it must either legalize life peerages, or agree to the abolition of the civil appellate jurisdiction of the House of Lords, and to the establishment of a new and independent court. Considering the historic glory of the House of Lords in relation to the administration of justice, and the confidence placed by the people in the integrity, wisdom, and learning of those who have hitherto

presided in this august tribunal, I hope that the present jurisdiction will be retained, and that the creation of life peerages will be sanctioned. (*Vide* 39 and 40 Vic. c. 59, 1876).

207. *The lesser barons.*—As early as 1427, James I. authorised the lesser barons to choose representatives to act for them in parliament; but this privilege long remained in abeyance. It was not till 1587 that the representation of the counties was placed on a satisfactory basis and really became operative.

208. *Qualifications of electors and commissioners of counties, and payment of expenses by counties.*—By 11 James VI. c. 114 (1587) the act of James I. was ratified, and the king's freeholders, who had 40s. a year in land, and actually resided in the county, were ordered to elect two wise men, who were freeholders of the king, had their dwellings in the shire, were possessed of good rents, and well esteemed, to act as commissioners of each shire, and have power to act in place of the shires. The freeholders of the county were to be taxed for the expenses of the commissioners.

In 1661 it was enacted that, besides the 40s. heritors *in capite*, all heritors, life-renters, and wadsetters holding of the king, and all others who held their lands formerly of the bishops or abbots and then of the king, and whose yearly rent amounted to ten chalders of victual, or £1000 Scots (all feu-duties being deducted), should be and were capable of voting in the election of commissioners of parliament, and to be elected commissioners to parliament, "excepting

always from this act all noblemen and their vassals." The allowance to the commissioners was fixed at £5 Scots a day, and was to be paid by the whole freeholders, heritors, and life-renters holding of the king and prince, according to the value of their lands and rents within the shire; but noblemen and their vassals were not liable to pay any part of it.

In 1681 (3 Charles II. c. 21) it was declared, in reference to the election of commissioners for the counties, that where the lands do not appear to be of 40s. of old extent, the right to vote shall belong to all who are infeft in land which is liable in public burdens for the king's supplies upon £400 of valued rent, held of the king or prince; and further, that life-renters and husbands, in respect of the freeholds of their wives, or as having a right to the life-rent by the law of courtesy, should claim their votes; and if they did not, the fiar should have a vote. The fiar and life-renter could not both have votes, unless for distinct lands of the holding, extent, and value already mentioned.

209. *Exposition of parliament in feudal times.*—This last act, perhaps as clearly as any hitherto in the statute book, discloses the grounds upon which the representation in the Scottish parliament was based. Possession of land was the basis of the whole structure, and an essential condition was that it should be held directly from the king. Thus the dignified clergy sat in the feudal parliament as freeholders or barons *in capite*, and the greater barons also appeared as freeholders of the king, and not till afterwards as peers created by the sovereign power. Moreover at

this time the tenants or vassals of the nobles had no representatives in the king's parliament except their own lords; and, as I have shewn, were not liable to pay any part of the wages of the commissioners of the lesser barons.

The lesser barons, although at one time obliged to attend the king in his great council, were ultimately released from the duty of personal attendance at the king's court, and compelled to elect commissioners to appear in their stead, to whom their whole powers and privileges were committed. This idea is fully carried out in regard to the lands which had belonged to the dignified clergy, and which remained in the hands of the king, and did not fall into those of the nobles.

In the royal burghs, in other words, in the burghs which had the right to send commissioners to the king's parliament, the only persons who had a right to vote for the burgh commissioners were the burgesses, who were obliged to be holders of land within the burgh.

Thus it appears that, according to the constitution of Scotland in the feudal period, none, either in town or country, except freeholders and burgesses of the king, had any right to sit or be represented in parliament. During the feudal period, and long after it came to an end, the great body of the people in Scotland had no place whatever in the national assembly.

210. *The lords of the articles.*—The lords of the articles, or, at all events, members of the Scottish legislature exercising functions as committees of parliament for the preliminary investigation of matters to

be brought before the whole house, take us back to the most ancient records of the kingdom. Thus, in the time of David II., the parliament transferred its powers to certain of its members, and then adjourned; and the usual course was to adjourn the parliament for a time sufficient to enable the lords of the articles to bring to maturity the measures to be decided upon by the whole parliament.

These lords were select committees of parliament, and, at first, were elected by the estates for the better management of business. In the preface of the acts of James I. (1424) it is stated that, after the convention and assembling of the three estates, certain persons were chosen for the determination of the articles laid before them by the king, and leave to go away was given to the rest. A similar preamble amongst the Black Acts, though not in the common editions of 1681 and 1682, is found in a statute of James III. Again, in the acts of James IV. (Black Acts, folios 84 and 85), the lords of the articles affirmed the desirableness of friendship and alliance with France, Denmark, and Spain; and thereupon power was given to the chancellor and the king's secret council, afterwards known as the privy council, to carry this expression of opinion into force, and money was voted for an embassy to Denmark. Further, on the recommendation of the lords of the articles, and for the proper support of the king in all his full honour and dignity, it was ordained by the parliament that all gifts, donations, infestments, &c., since the coronation of James IV. should be abrogated and annulled. According to a statute of 11 James VI. c. 37 (1587) an

equal number of each estate was to form the committee known as the lords of the articles, the smallest number from each estate being six and the greatest ten. Further, an act of 14 James VI. c. 218 (1594) ordains that, when the parliament is ordered to be proclaimed, a convention shall be appointed, composed of four of each estate, to meet twenty days before the parliament to receive all manner of articles and supplications concerning general laws, or touching particular parties. It also provides that his majesty might present such articles as he thought good concerning himself, or the commonwealth of the realm, at all times when he thought it expedient. At last, the lords of the articles became the source of intolerable injustice. By Charles II. par. 1. sess. 3. c. 1 (1663), the lords of the articles were, by the manner of their election, subordinated to the will of the king; and they were consequently abolished by William and Mary, p. 1. s. 2. c. 3 (1690), and the injurious act of 1663 was rescinded.

As far as can be gathered from the public records, it appears that these lords of the articles were chosen to prepare and facilitate the progress of public business. Until converted into the instruments of tyranny and oppression at a late period of their existence, they were most useful in carrying on the affairs of the nation, and in the working of parliamentary institutions in Scotland; and I venture to think that a similar body would be highly advantageous in our parliaments of the present day. In some form or another, an analogous body will soon require to be appointed for the British House of Commons.

I will now endeavour to lay before you the various steps which led to the establishment in Scotland of the Presbyterian form of church government.

THE CHURCH.

211. *The French and English factions.*—It will be remembered that James V. was strongly opposed to the separation of the Scottish Church from the see of Rome. His death, followed by the minority of Mary and the regency of Murray, greatly contributed to the propagation of the reformed doctrines amongst the people. The nobles were divided into two hostile camps, and their predilections for France or England determined their attitude towards the Reformation. The partizans of Mary of Lorraine the queen-regent and of the French alliance defended the old Church, and those of the English factions favoured the reformers and their doctrines. Apart from these political factions, but not independent of the English party, stood the great body of the nation, and especially the inhabitants of large towns. The majority of the townspeople were strongly attached to the Reformation, and really brought it to a successful termination. When the whole strength of the people is put forward in any cause it becomes irresistible.

212. *Many reformers suffered death, and Knox was long in exile.*—Amongst the many reformers who suffered at the stake one of the most prominent was Wishart, who was burned as a heretic at St. Andrews. His death was intimately connected with the assassi-

nation of Cardinal Beaton in the castle of St. Andrews in 1546, and with John Knox's banishment to the French galleys in 1547, and the enforced absence of the great reformer from Scotland till 1559. During the interval, Knox had been several years in Geneva, where Presbyterianism had been established under the auspices of Calvin. After Knox's return, and till his death, Knox became the central figure in all ecclesiastical, and in most civil matters, in Scotland. He was a man of whom any nation, or any age, might well be proud.

213. *Early reforms contemplated, and the first Covenant signed.*—In 1541 an act was passed against the abuses of the clergy, and in 1542 a project was mooted for the translation of the Old and New Testaments into the vernacular language. Then in 1549 there was a meeting of the provincial church, and sweeping reforms were agreed upon. Amongst these were the putting away of clerical concubines, resolutions to live soberly, not to trade, to reform the manners and rules of the monks and nuns, and for the better administration of the consistorial courts, and a strict inquiry into all charges of heresy. For these reforms there was the greatest need.

As yet there was neither disloyalty to the church nor to the crown. The great event which caused a marked difference between the reformers and their opponents was the signing of the first Covenant in 1557. This document contained two resolutions: first, That the book of common prayer should be read every Sunday by the curate if able, and if not able by the best qualified man in each parish; and second, That there should be a quiet teaching of the Scriptures

privately, and afterwards by true ministers. The leaders of the Protestant party then formed themselves into the body known as the Lords of the Congregation, and presented remonstrances to the queen-regent, demanding a reformation of abuses, and the establishment of religion on the basis of the resolutions of the Covenant.

214. *Alliance between the Lords of the Congregation and Queen Elizabeth.*—The queen-regent asked for delay, and counselled moderation. Shortly afterwards De Bethun came from France as ambassador, and then began the intrigues of the Guises against the new doctrines, and the Protestant schemes for an alliance with England. In 1559 some of the reformed clergy were called before the privy council at Stirling, and outlawed. In quick succession came the riots of Perth, and afterwards the celebrated wrecking of the cathedrals and monasteries. This was the critical moment of the Scottish Reformation; and about this time a treaty was concluded between the Lords of the Congregation and Queen Elizabeth for the defence of the ancient rights and liberties of Scotland. The main object of this treaty was the expulsion of the French from Scotland by Elizabeth's assistance. This was soon accomplished.

215. *The estates adopt the principles of the Reformation.*—The queen-regent died in 1560. The estates, having been assembled on the 17th of August 1560, on the 25th, ratified and approved of the Confession of Faith, abjured the pope of Rome, and declared that those who administered, or were present at the administration of, mass were to be punished, for

the first offence, by the loss of their goods and by corporal inflictions; for the second, by banishment; and for the third, by death.

On the demise of her husband Francis II., Queen Mary left France, and arrived in Scotland in September 1561. She, as all know, was a Roman Catholic; and, although she never explicitly ratified the resolutions of the estates of 1560, she agreed, by royal proclamation, to allow the religion of the nation to remain as it existed on her arrival from France. Thus the power of the pope was overthrown in Scotland, and the reformation of the Scottish Church was virtually established.

I will now briefly indicate some of the prominent changes which were effected in the religious practice and habits of the nation; and thus explain the government and doctrines of the Church substituted for those which had been abolished.

216. *Complaints against lay impropriators.*—Disputes soon arose as to the temporalities of the Church, and Knox and the Protestant clergy denounced those who had seized upon the Church's patrimony. The lay impropriators were chiefly Protestant nobles. Redress was hopeless; for these nobles kept a firm grasp of the temporalities of the Church, and were not frightened at the threats which the clergy hurled against them. Amongst the objects to which a portion of the Church revenues was intended to be devoted by Knox and his fellow-labourers was the appropriation of the town revenues, and undestroyed edifices of the monastic establishments, for schools and colleges and such like purposes. This most

laudable scheme was defeated by the rapacity of laymen.

217. *Popery condemned by the general assembly: civil war, and Murray appointed regent.*—At a general assembly of the Church in 1565, resolutions were adopted against popery and the celebration of mass, and in favour of establishing the true religion, and of a certain amount of church attendance being made compulsory by act of parliament, and of the ecclesiastical revenues being handed over to the Church. These were presented to the queen, and the answer was that she would allow freedom of conscience to all, and wished it for herself, and declined to comply with the request as to the church property. The truth is, the queen was taking steps to oppose the national wishes by force. The Protestant party therefore flew to arms, defeated the queen's forces, and appointed the earl of Murray regent for the kingdom.

218. *The Protestant religion established by law.*—By 1 James VI. c. 3 (1567) the pope's authority in Scotland was abolished, and all acts of parliament made contrary to God's Word and the maintenance of idolatry were annulled, and the confession of the reformed faith and doctrine was placed on the statute book of Scotland. The mass was also abolished, and all who heard or said the same were liable to punishment: 1 James VI. c. 5. Thus, what was done by the estates of parliament in 1560 was ratified by the legislature of 1567, and the Protestant religion was firmly established in Scotland according to law.

219. *The doctrines, discipline, and form of worship.*—In the first Book of Discipline approved of,

published in 1578, the system of Presbyterianism, comprehending sessions, presbyteries, provincial synods, and general assemblies, will be found.

A Protestant assembly was held in Scotland in 1559. It declared that the high dignitaries of the old church were simply ministers of the new; that superintendents were to be appointed to act as a kind of executive of the assembly and synods; that there ought to be one rule for all the clergy; and that no one who was not elected by the people, and examined and admitted by the superintendent, could be nominated to a kirk.

A printed liturgy or prayer book for public worship was sanctioned by the Reformed Church in 1557. This liturgy stood in marked contrast to the Roman Catholic breviary by its rejection of the pontificate as a divine hierarchy, of the real presence, of the spiritual efficacy of the sacraments, of the power of absolution, of purgatory, and of the effective intervention of the saints. There was also another liturgy, known as the Geneva or Knox's, published in 1560. This second liturgy (edition 1565) was sanctioned by the church authorities in Scotland and also by Calvin; and in the year 1564 ministers were exhorted to use it. The Geneva liturgy can be traced here and there in the country for a century, and then disappears from public use in the churches.

219. *Episcopacy held unscriptural, and Presbyterianism established in 1592.*—At a convention, called a general council, held in Leith in 1572, archbishops and bishops were to be allowed to remain in the Church till the majority of the king, or till an alteration was

made by parliament, but they were to be subject to the general assemblies ; and even the regular clergy, *e.g.* the abbots, were to be maintained in the Reformed Church. But the Protestants were alarmed by the terrible massacre of St. Bartholomew in October 1572. A general assembly was therefore immediately held in which a rigid enforcement of the laws against papists was demanded, and great popular zeal was aroused in favour of Protestantism.

Hitherto there was not a single word in the statute book as to any change in the ordinary government of the Church. Even in 1572 parliament decided that the true kirk was to be maintained by lawful archbishops, bishops, superintendents, by ministers and readers, and by a combination of dioceses and provinces. Knox died in 1572, and was succeeded by John Craig and Andrew Melville as the leaders of the Reformation. It was not till 1574 that the general assembly resolved that bishops should be placed on the same footing as superintendents ; nor till 1580 that the office of bishop, as exercised in Scotland, was held to be unscriptural, and that, for the office of pastor, a bishop must be re-admitted to the Church by the assembly, and whoever should act in contravention of this finding was to be excommunicated. Then came the second Book of Discipline, completed in 1581, and called the King's Confession, which had the defence and support of King James VI. for its practical object. The legislature was now ripe for an entire change of church government, and consequently, in 1592, abolished Episcopacy in Scotland, and established Presbyterianism.

220. *King James VI. and his clergy.*—For a considerable time, the attacks made from the pulpit upon the king, the court, the nobles, and private individuals were a source of great complaint, and had almost become unbearable. The claims of clerical independence were exorbitant and incompatible with civil government. The disputes on these points were partially arranged at a general assembly held in 1597, when it was declared to be lawful for the king to propose remedies for matters affecting the external government of the Church; that none of the king's laws were to be reproved till a remedy was sought in the Church courts; that no man's name should be mentioned in the pulpit unless his sins were notorious; that every summons from a Church court should state the cause and crime alleged; and that, in all the principal towns, the ministers were to be chosen with the consent of the congregation and the king.

James was determined to subdue the High Church party in Scotland, and gained an easy victory. A general assembly of the Church was proposed to be held in Aberdeen, but it was prohibited by royal proclamation. Several persons were apprehended for disobedience to the king's commands, and some of them were tried by the secret council. The prisoners objected to the jurisdiction of the king's council on the ground that the matters charged against them were spiritual, but they were banished for life from the king's dominions as guilty of high treason. Another case arose out of words spoken in the pulpit by Andrew Melville against King James

and Queen Elizabeth. Melville called Elizabeth an atheist. He was summoned before the privy council, declined its jurisdiction at the instigation of the Church courts, but was found guilty, and fled across the border. The Church then made a vain protestation that, for words spoken in the pulpit, the speaker was not liable to be punished by a civil, but only by an ecclesiastical court.

221. *James VI. bent on establishing Episcopacy.*—James continued to press forward his own notions of church government upon Scotland, and in 1606 Episcopacy was established. General assemblies were to be authorised by the king, and no act of discipline, or other ecclesiastical right, was to be valid, unless sanctioned by the bishops; and the act of 1567 was repealed.

A general assembly was afterwards held in Perth in 1618. Five articles were there agreed upon: first, kneeling at the sacrament; second, communion in private houses only in cases of sickness; third, private baptism on necessary cause; fourth, confirmation of children of eight years old by a bishop; and fifth, the order for keeping holidays. These articles received the sanction of the estates of parliament in 1621; and in the reign of Charles I. an agreement or submission as to the appropriation of the ecclesiastical property in lay hands was ratified by the estates in 1633.

222. *The Episcopal Church constituted by royal warrant.*—The canons and constitution ecclesiastical for the government of the Church of Scotland were given forth to the public under the hand of King

Charles I. by a royal warrant issued in 1636. They contained a complete code of ecclesiastical law, and were issued by the king without official consultation with the political or ecclesiastical representatives of the nation. This warrant, which is without parallel in the history of Europe, astonished and alarmed our forefathers, and roused them to a just wrath and indignation against the king's tyrannical conduct as a flagrant attack upon their civil and religious liberties.

223. *The popular indignation against the royal proclamation of 1638.*—A proclamation, dated the 20th day of December 1638, was issued to enforce the new book under the pain of being put to the horn, i.e. of outlawry. Legal suspensions of the threatened writs of horning followed, and virtually succeeded in the civil courts; great mobs assembled in Edinburgh, and large numbers crowded into the metropolis; proclamations were issued ordering strangers to leave the city, and threatening the removal of the king's council and the supreme courts of justice; but the people crowded to Edinburgh, and four tables or committees were formed, representing the nobles, lesser barons, burgesses, and clergy, in support of the popular cause. The king issued another proclamation commanding obedience to his church service, and the committees issued a counter-proclamation full of fierce denunciations, and asserted that their object was to maintain their religion, laws, liberties, and king.

224. *Rebellion followed, and the act of 1606 repealed.*—Rebellion followed both in Scotland and England. The Scottish Covenanters began to organize themselves; and negotiations were tried and failed.

Charles I. then attempted to carry out his religious ideas by force, but ultimately authorised the duke of Hamilton to grant free general church assemblies and free parliaments, and abandon the service book, canons, court of high commission, and the articles of Perth. A general assembly was accordingly held in November 1638; but Episcopacy being attacked, and laymen appearing in the assembly, the king's commissioner resolved not to countenance it. Still business went on there without him, and the act of 1606 establishing Episcopacy was repealed, and the Covenant was ordered to be signed by ministers of the universities, colleges, and schools, by all scholars on taking their degrees, and by all ministers of the kirk and kingdom. These proceedings were approved of by the parliament of 1640.

225. *The Westminster Assembly.*—The Westminster Assembly was constituted by an ordinance of the Lords and Commons of England on 12th June 1643. Its object was to abolish bishops and other dignitaries in the Church, and settle the Reformed religion. It consisted of a hundred and twenty-one clergymen, with ten peers and twenty members of the House of Commons as lay assessors. Certain Scottish commissioners were also invited to attend, and were present, but declined to vote. The Assembly passed these resolutions: 1. That the Reformed Protestant Church in Scotland should be preserved; and 2. That prelacy, superstition, heresy, and schism should be extirpated. The majority of the parliament, by which this Assembly was authorised, were determined not to allow any Church organization to domineer over the civil govern-

ment, and consequently the claim which was set up for the divine origin of Presbyterian Church government was strenuously resisted; and in the parliamentary ordinances of the 14th March 1646, the parliament was made supreme, and the Church subordinated to the civil power.

226. *The Westminster Confession of Faith, &c.*—Amongst the fruits of the Westminster Assembly were the Westminster Confession of Faith and the Larger and Shorter Catechisms. This Confession fixed, for the first time, the canonical or acknowledged books of Scripture; and the Catechisms are sufficiently well known to all of you without any observations from me as to their contents.

227. *The Commonwealth opposed to ecclesiastical supremacy: restoration of the Stuart dynasty.*—A general assembly was attempted to be held in 1653; but Monk, Cromwell's lieutenant-general, would not allow it to transact business. He was told that the assembly was held by the laws of God and the land; but he peremptorily dissolved it, and ordered its members to depart from Edinburgh. The Commonwealth was swept away almost on Cromwell's death, and the Stuarts were restored to the British throne in the person of Charles II.

228. *Episcopacy again established, and the Presbyterian clergy persecuted.*—Soon after the accession of Charles II. James Sharp was sent to London as the representative of the Scottish Presbyterians; and, after remaining some time in England, came back to Scotland as archbishop of St. Andrews. His return was followed by the act of 1661 for the restoration

of the ancient government of the Church by archbishops and bishops. About the same time, the Covenant was solemnly burned by the hangman; and in 1662 the oaths to the League and Covenant were declared unlawful, and against the fundamental laws of the realm.

Afterwards an act was passed prohibiting Presbyterian ministers from exercising their ecclesiastical functions, and declaring the churches of recusants to be vacant. Three hundred and fifty of the clergy abandoned their benefices rather than surrender their religious convictions.

229. *Laws against non-conformists.*—In 1663 a statute was made against absentees from regular worship in the parish churches, and fines were imposed for absence. The Court of High Commission, which was instituted for the punishment of all offences against the ecclesiastical regulations of parliament or the privy council, was restored. In 1670 an act was passed against conventicles, or unlicensed places of worship; and writs of intercommuning were raised in 1676 against those who held intercourse with persons who had broken the laws as to conventicles, and heavy penalties were imposed on the offenders. The Covenanters made great preparations to prevent those writs from being enforced, and they defeated Graham of Claverhouse. The rebellion increasing, the Duke of Monmouth was sent by the government against them. The duke defeated them on 24th June 1679, and Hackston and Cargill, two leaders of the Cameronians, were tried and executed in Edinburgh. Revolting cruelties were, at this period, inflicted upon the Covenanters.

230. *James VII. and his grants of indulgence.*—After James VII. who was a Roman Catholic, ascended the throne, the Scottish parliament re-enacted the test acts, and was sternly opposed to the Covenanters. But in 1688, a full and effective indulgence was granted by the king to the moderate Presbyterians, and to all, whether papists or quakers, who applied to the king's grace for toleration. This offer of indulgence did not stop the persecution of the conventiclers; and Renwick, the head of the Cameronians, was put to death in 1688.

231. *The revolution of 1688.*—The downfall of James VII. was at hand. The great body of the people of Scotland were Presbyterians, and would have nothing to do with the king, or his proclamation which was both illegal and arbitrary. The Scottish parliament therefore declared that the king had forfeited his right to the throne, and then bestowed the crown upon the Prince and Princess of Orange.

232. *Concluding remarks on the progress of the Reformation.*—These deductions are, I think, fair and reasonable: First, The Church of Scotland is a national institution, and derives its authority as a national establishment from the supreme legislative power of the country. Second, As a national institution, it is subject to the legislature, and may be altered in its constitution, and even abolished, by the supreme council of the nation. Third, Its revenues, so far as derived from national funds or resources, may be withdrawn and appropriated to other purposes. Fourth, As the Church was endowed for the propagation of religion, piety, and charity, so, on the other hand, if

it should ever be disendowed, its revenues should be directed to really kindred and national objects, such as education and the like. Lastly, As the freedom of individual thought is the chief corner-stone of the Reformation, and its best justification, it ought never to be forgotten that this is the fundamental doctrine of religious liberty and toleration ; and that, whatever may be the difference in religious opinions or practices, neither the state, nor any corporate body, nor any individual, ought to impose religious opinions or observances upon another. The cardinal doctrine of religious as well as of civil freedom is, that every one ought to be free to do or think what he pleases, provided he does not interfere with the like freedom of others.

The administration of justice, which continued, during the period under consideration, very much in the same condition as we left it in my last lecture, must now engage our attention.

THE ADMINISTRATION OF JUSTICE.

233. *The College of Justice : the judges not to take bribes, and to be properly qualified.*—Certain acknowledged abuses required to be swept away. It was therefore declared in 1579 by 6 James VI. c. 93 (1st), that no lord of session by himself, his wife, or servants, should take any bribe, goods, or gear from the pursuer or defender, under the pain of deprivation, infamy, and escheat of movables, and that the offender's person should be at the king's will ; and (2nd) that the king

should nominate, as lords, men fearing God, able and having sufficient livings of their own, and who should be tried by a number of the lords; and, in case the person presented should not be found qualified, the lords might refuse to approve of him, and the king should present another. A statute was also passed in 1592, 6 James VI. p. 12. c. 132, in similar terms as to the persons to be elected, and further that the lords should not be less than twenty-five years of age.

234. *They were not to judge in their friends' causes.*—By 6 James VI. p. 14. c. 212 (1594) it was enacted that no lord of session, ordinary or extraordinary, might sit or vote in any cause in which the pursuer or defender was either his father or brother or son. This statute was afterwards extended to all degrees of affinity, and to all cases in which the lords were uncles or nephews of the litigants: 3 Charles II. c. 13.

235. *The nobile officium.*—By 1 James VI. c. 18 (1567), it is declared, in answer to an application made by the senators of the College of Justice, that, notwithstanding any confirmation by the king, or grant of parliament past thereupon, the College of Justice should be competent to decide in actions for the reduction of infeftments. Thus, this court, like the supreme court of the United States, was invested with a most extraordinary appellate jurisdiction, and, in a manner, placed above the legislature. It has always claimed a certain degree of legislation; but it is difficult to see how it could lawfully exercise any authority which was not given to it by the supreme power either expressly or by implication. .

236. *The Court superseded by Cromwell's civil tribunal, and re-established by Charles II.*—During the Commonwealth the Court of Session was abolished, and was superseded by the civil tribunal established by Cromwell. This court had four Englishmen and three Scotchmen as judges; and, although the proceedings of the new court were ratified in 1661, it was made lawful for any one, who had been injured by it, to bring any decision under the review of the Court of Session, within a year of the re-establishment of the Court of Session, or, if the party injured was a minor, of his majority: 1 Charles II. c. 12.

237. *Matrimonial causes relegated to the Court of Session.*—It will be remembered that, during the existence of Roman Catholicism in Scotland, churchmen exercised an extensive jurisdiction in civil matters and especially in matrimonial causes. In the reign of Queen Mary a temporary court was erected in the place of the consistorial court of the bishops, but it did not long continue in existence. The want, created by the abolition of Episcopal jurisdiction in this matter, was supplied by 20 James VI. c. 6 (1609), whereby it was declared that the lords of session should be the king's great consistory, and a supreme commission was granted to them in all consistorial causes. As may be seen from the reports as to actions for divorce in Scotland, this jurisdiction is retained by the Court of Session to the present day.

238. *Constitution of the Court of Justiciary under James VI.*—By 11 James VI. c. 81 (1587) the justice general, or his majesty under the quarter seal, was to appoint eight deputes from the lords of session or

experienced advocates; two for each quarter of the realm, with a depute from the treasurer and another from the justice clerk; and, in order to prepare for the justice courts, the king, with the advice of the chancellor, treasurer, and justice clerk, was to give commission to honourable men in each shire, with four of the council of each burgh within itself, who should be the king's justices, and should have power to take up indictments by themselves, or by a sworn inquest of sworn men, of greater crimes, and either to apprehend the persons delated, or deliver them in person to the crownors every month that he may secure them to the next ayre; and for lesser crimes, to do justice themselves, and for that end to meet four times a year. Further precepts were to be sent to the crownors and sheriffs and officers of arms for the said moving assizes, and each assizer was to appear under pain of a fine of £10.

239. *Remodelled to the existing form by Charles II.*—During the reign of Charles II. the justice deputies were suppressed, and five lords of session were added to the justice general and justice clerk. The court thus constituted was to form the Court of Justiciary; four judges, except on circuits, were to be a quorum, and in the vacation of the session three; and all the judges were ordered to meet in Edinburgh in July yearly: Charles II. p. 2. s. 3. c. 18, and Charles II. p. 3. c. 22.

With slight modifications this high court of criminal justice, as thus constituted, has existed for upwards of two hundred years. Recently, it has been suggested that the circuits might almost be abolished, or, at

least, that the jurisdiction now exercised on circuit might to a great extent be entrusted to the inferior tribunals. Perhaps, the best way of arriving at a satisfactory result would be to restrict the jurisdiction of the High Court of Justiciary to the pleas of the crown, and relegate all other serious offences to the sheriffs.

240. *The jurisdiction of the Court of Admiralty.*—The court of the lord high admiral was a sovereign judicatory, and is mentioned in the statutes of James VI. in regard to its rights and procedure: James VI. par. 12. c. 157; Ib. p. 18. c. 10, and Ib. p. 22. c. 15. Its powers were ratified by Charles II. p. 3. c. 16, and its jurisdiction minutely described. The lord high admiral had civil and criminal jurisdiction on the high seas and the navigable rivers, and the sole and exclusive jurisdiction of all maritime causes, foreign or domestic, civil or criminal.

241. *The jurisdiction of justices of the peace.*—In the reign of James VI. justices of the peace were introduced into the legal system of Scotland. They had long before existed in England. Their duties are extensive and multifarious, being chiefly concerned with the keeping and the maintenance of peace, and diffusing goodwill amongst neighbours. Thus far they have exercised a beneficial influence on the community. Amongst the matters entrusted to them were the fixing of fees or wages for servants, prices for craftsmen, the punishment of idle persons and Egyptians and their resettlers, supervision of highways, injuries to trees,

brewing ale, appointing visitors for ale houses, and the punishment of drunkards, cursers, and swearers, or mockers of piety; and, in all heinous crimes, the apprehension and bailment of offenders, the examination of witnesses, the handing over of the charges to the quarter sessions or other criminal courts; and the making of lists of the poor, and the appointment of overseers of those who needed parochial relief.

Here I may be allowed to make a few observations on some features of the administration of justice, for which I have not hitherto had a more suitable opportunity.

242. *Abuses in the Court of Session, and yet no appeal to parliament till after the Union.*—It is to be feared that, during this period, the administration of justice was far from being pure. In the reign of Charles II. there was a clear case made out against the Duke of Lauderdale for tampering with the administration of justice in furtherance of his personal aims. The duke was an extraordinary lord of session, and wishing a friend of his to succeed in a suit before the court, he sat and voted at the giving of judgment. The defeated litigant appealed to parliament; the advocates for the appellant were suspended by the Court on the ground that no such appeal could be brought; a great number of the Scottish bar supported the appeal; and the contest lasted for two years, and ended in 1676 by a compromise. That an appeal could be made to the British parliament was affirmatively decided after the Union.

243. *Torture used, and the earl of Gowrie exhumed and declared a traitor.*—During this period, although advocates were allowed to appear in court for prisoners charged with treason, the thumb-screw and the boots were not unknown as instruments of torture for the purpose of eliciting confessions or disclosures of guilt. Towards the earl of Gowrie, who was concerned in a conspiracy against James VI., a strange and revolting proceeding was adopted. He was taken from his grave, laid before parliament, adjudged a traitor, and his estates were forfeited. I am thankful that Mackenzie and Hailes both say that this barbarous and inhuman exposure of a dead man's body was not required by the laws of our country, and can only be accounted for by the intense hatred which James VI. felt against the house of Ruthven.

244. *Letters of fire and sword.*—A curious custom long existed in Scotland, authorised by the king or the supreme court, under the title of Letters of fire and sword. These were issued against a public enemy, or against some great offender, at the instance of a private person who could not otherwise get relief. They were frequently used against the chiefs of the north, and terrible havoc and devastation were perpetrated under their sanction. Of these, let two instances suffice. In 1583 James V. issued a mandate against the Clan Chattan, in which he charged the lieges to invade the Clan "to their utter destruction by slaughter, burning, drowning, and otherways, and leave no living creature of the Clan except priests, women, and bairns." The massacre of Glencoe will serve for another example. The massacre of the

Macdonalds at Glencoe was a disgraceful act of tyranny, oppression, and treachery. It must ever cast a dark shadow on the glorious name of William III.

These Letters may be looked upon as a remnant of the old right of private vengeance.

245. *Register of deeds as to land*.—Closely connected with the administration of justice is the admirable system of registration in Scotland for all deeds affecting land. It was introduced in the reign of James VI. and has continued till this day to the entire satisfaction of the Scottish people. *Vide* 22 James VI. c. 16 (1617); Charles II. par. 2. sess. 1. c. 3 (1669). It was extended to burghs by Charles II. p. 2. s. 3. c. 16. As to crown charters, *vide* 23 James VI. c. 24 (1621); and as to minute books, *vide* Charles II. p. 2. s. 3. c. 7; and *Ib.* p. 2. s. 3. c. 16. The leading principle of the system is that, unless registered, no deed affecting the right to land shall injure a third person who has registered his conveyance, mortgage, or other right, in the public records kept for the purpose. Thus, although a conveyance to land is granted on one day, and another on a subsequent day, yet, if the latter is registered first, it will be preferred in law to the one first executed. At the same time, although the first deed would be null and void as to a third party, it would not be so as to the granter and his heirs. *Vide* William & Mary, par. 1. sess. 6. c. 18 (1694).

246. *System should be adopted in England*.—The want of this kind of public register has been severely felt in England. The remedies proposed are all defective

in principle, and will never be effective until the law imperatively insists on a complete record of all transactions as to land, or, at least, gives some tangible advantage to landowners, heritable mortgagees, and others, who submit to public registration in order to enable the public to know what rights and obligations attach to particular lands, houses, and tenements.

I will now mention the most important civil and criminal laws passed between 1542 and 1688.

LAWS, CIVIL AND CRIMINAL.

First—Civil.

247. *Lands may be entailed.*—In 1685 (1 James VII. c. 22) an act was passed by which it was declared to be lawful to entail lands and estates, and to substitute heirs in entails with such provisions and conditions as the owners thought fit, and to restrict the rights of the actual possessor of such lands in such manner as to make it unlawful to the heirs of entail to sell, alienate, or dispoise the lands or any part thereof, or contract debt, or do any other deed whereby the same might be appraised, adjudged, or evicted from the other substitutes of the entail, or the succession frustrated or interrupted; declaring all such deeds to be in themselves null and void. If the terms of this act were not strictly observed, neither creditors nor singular successors, who had contracted *bonâ fide* with the person who stood infest in the entailed estate, were to be injured. The fines and casualties due to the king and the superior were not to be affected by such entails.

No serious attempt has been made till recent times to abrogate this law. Whatever may have once been the policy of the nation, there is not now any valid reason for protecting land to a particular series of heirs for all ages in such a manner as to compel bonâ fide creditors to lose debts due from persons who have the ostensible means of paying what they owed. The laws as to landed and personal property should be assimilated as nearly as possible.

248. *The consent of the superior required where land held by ward and relief.*—With regard to the feuing of land by sub-vassals in violation of their lord's rights, an act was passed in 1606 in explanation of an act of James II. which ordained that it should not be lawful to any vassal of any earl, lord, prelate, baron, or other freeholder, possessing lands under the feudal burdens of ward or relief, to feu his lands without the special consent of his superior, or the confirmation of the latter: 14 James VI. c. 12. This act was afterwards extended to the lands held by feudal tenure from the king and prince: Charles I. p. 1. c. 16. Both statutes were swept away by the abolition of feudalism.

249. *Forfeiture of land for unpaid feu-duties.*—It was also enacted in 1579 that feuars who did not pay their feu-duties for two years should lose their feus. But a liberal interpretation was given to this statute by the judges, who always allowed the amount due to be tendered in court: 15 James VI. c. 245.

250. *Terce excluded by special provision.*—By 3 Charles II. c. 10 (1681), it was ordained that, in all time thereafter, where a particular provision should be

granted by a husband in favour of a wife, she was debarred from all terce, unless it should be expressly reserved in the writ by which she had right to the special provision.

251. *The interest of stranger executors in personalty.*—In consequence of the ignorance of great numbers of the people as to the effect of making a will or testament in favour of strangers, even although such persons were never intended by the testator to get any part of their personal estates, but merely to act for behoof of their relations in the management and realization thereof, it was enacted in 1617 (22 James VI. c. 14) that strangers who were appointed executors should hold the funds under their charge for the wife, children, and next of kin, according to the division observed by the laws of the realm; and, unless a legacy was given to them by the testator, they should never be entitled to more than one-third of the testator's free personalty. This was a step in the right direction. Subsequently executors did not get even the one-third which they were allowed to retain under this act.

252. *The quot to commissaries abolished.*—The quot, as it was called, or one-fourth of the free residue of the deceased's personal estate, payable to commissaries on the confirmation of the executors, was finally abolished by William III. par. 1. sess. 9. c. 14; and, in lieu thereof, fair and reasonable fees were to be paid for the future.

253. *Reduction of deeds by minors.*—It appears from a statute of 1681 that great abuses were practised against minors under twenty-one years of age by causing them to subscribe bonds for borrowed money,

contracts of alienation of their lands, dispositions, discharges, and other writs of importance, and to ratify the same by an oath, whereby they were deprived of the benefit of reduction. It was therefore enacted that no such oath should be exacted; and, in case of contravention, the contracts were to be null and void, the exaction of the oath infamous, and the writ reducible at the instance of any person related to the minor: 3 Charles II. c. 19.

254. *Usury*.—In all civilized states, provision had always been made against the circumvention of the young and inexperienced against the cunning and deceit of others, and even against their own imprudence. Nay more, the principle of protection was carried, in former times, much further, and notably in the case of usury, or the payment of a rate of interest greater than was allowed by law. The laws against usury have been abrogated as contrary to the just principles of commercial dealing, and all persons of full age may now agree to pay interest at any rate they please for the money which they borrow. In the reign of James VI. however, the rate of interest was fixed at ten per cent. and all deeds by which a higher rate was exacted were null and void: 11 James VI. c. 52; Ib. p. 14. c. 222; Ib. p. 15. c. 247; Ib. p. 16. c. 7; Ib. p. 23. c. 28; and Charles II. p. 1. s. 1. c. 62.

255. *Bankruptcy and fraudulent alienations*.—Against fraudulent bankrupts a statute was made in 1621 (23 James VI. c. 18). Strange to say it was a ratification of an act of the lords of council and session. The preamble refers to the frequency of men obtaining the property of others without any intention to pay

for the same, and afterwards disposing of their means and property to their friends. It is then declared that all alienations, dispositions, assignations, and translations whatsoever, made by the debtor of any of his lands, tiends, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person without true, just, and necessary cause, and without a just price really paid, the same being made after the contracting of lawful debts with true creditors, to have been from the beginning, and to be in all time thereafter null, and of no avail, force, or effect, at the instance of the true and just creditor, by way of action, exception, or reply, without further declarator. This statute also lays down that *bonâ fide* purchasers from the interposed person shall be good. It then states the manner in which proof of a fraud is to be shewn, and the responsibility of the interposed person to the bankrupt's creditors for any sum he might receive for the rights or property conveyed to him by the bankrupt.

This act is admirably drawn, and reminds me of the praise so justly bestowed by Lord Bacon on the old Scottish acts of parliament, an honourable characteristic which, I fear, was lost in the lord chancellor's own age, and, with few exceptions, has rarely distinguished the statutes of modern times. The explanation of this lies in the fact that this and other ancient statutes were drawn by experienced lawyers, and were not altered by those who did not know what the existing law was when changes were proposed to be made.

256. *Prescription*.—According to the civil law, and, indeed, the laws of almost all countries, claims are not enforceable legally for ever. This principle has been incorporated into the law of Scotland, and certain rules, varying with the subject matter, have been fixed as the periods within which legal rights are lost or prescribed.

Forty years as to land. — Without giving you the precise words of the act of 1617, I may say that the effect of the law of prescription as to land in the reign of James VI. is that, if a person and his predecessors possess land for forty years, without interruption, and by virtue of being heritably seized therein, they shall not be dispossessed of such property by any other person claiming right to the same, except on the ground of falsehood or of reversions incorporated into their rights: 22 James VI. c. 12.

Seven years as to cautionary obligations.—By a law passed in 1695 (c. 5) as to principals and cautioners, it is declared that cautionary obligations expire at the end of seven years.

Three years as to ordinary debts.—The triennial prescription established in 1579 has reference to ordinary debts, and is good law now, and stands thus: That all actions of debt for house mails, men's ordinaries, servants' fees (wages), merchants' accounts, and other the like debts that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action, unless he prove his claim by the writ or the oath of the party: 6 James VI. c. 83.

You will observe that this act does not extinguish the debt, but limits the mode of proof. In England the prescription runs from the dates of the separate items, and in Scotland from the last date, of an account.

257. *Speedy execution on foreign and inland bills.*—Upon foreign bills or letters of exchange from or to this realm, and which, as you know, have the privilege of being transferred from hand to hand by indorsation or delivery almost as easily as money, and sometimes more conveniently, the right of speedy execution was conferred by 3 Charles II. c. 20 (1681). The procedure which this act allows consists in a short document, called a protest, being registered in the books of the court of session or of the sheriff-court, and then execution being allowed to proceed against the debtor or party liable as upon a fully litigated cause before a judge.

This important advantage as to foreign bills was afterwards conferred in 1696 upon inland bills by William III. sess. 6. c. 36.

Second—Criminal.

258. *Leasing making.* — Leasing making was punished by death, and the loss of goods to the king. It was an offence of very varied character, *e.g.* :

Slander against the king and his council.—By 8 James VI. c. 134 (1584), it was declared that none of the king's subjects should presume or take upon him, privately or publicly, in sermons, declamations, or

familiar conferences, to utter any false, slanderous, or untrue speeches, to the disdain, reproach, or contempt of his majesty, his council or their proceedings, or to the dishonour, hurt, or prejudice of his highness, his parents and progenitors, or to meddle in the affairs of his highness and his estates present, bygone, and in time coming, under the pains contained in the acts of parliament against makers and tellers of leasings.

This statute was specially intended to put an end to the violent attacks made by the clergy against the king and his government.

Giving council against the union of Scotland and England.—All authors or publishers of scandalous speeches or writings as to the estates, people, or country of England, or any councillor thereof, tending to the remembrance of ancient grudges, or the hindrance of the then intended union, or whereby hatred might be fostered or misliking raised between his majesty's subjects in this island, are liable to the penalties of lese-majesty; and the same punishment was to be inflicted upon all hearers or councillors: James VI. p. 20. c. 9 (1609).

Wide extension of the crime of treason.—The lax way in which treason was applied in Scotch law is rather startling, but as involving a betrayal of a high trust or duty is perfectly intelligible. *E.g.* 1. Landed men convicted of common theft and reset of theft incurred the pains of treason, that is to say, loss of life, lands, and goods: 11 James VI. c. 50. This was in the year 1587, and may help to give some idea of the unsettled state of the country at that time. 2. The wilful setting fire to coal heughs is declared

treason, and punishable with the pains thereof: 12 James VI. c. 146. 3. The murder and slaughter of a person under the trust, credit, assurance, and power of the slayer is also made treason by 11 James VI. c. 5. 4. To accuse another calumniously of treason when the party accused was acquitted: 11 James VI. c. 49.

Other and more justifiable instances of treason.— I shall now give some instances more in harmony with modern notions of treason, of which, as I have indicated, the essence is a breach of good faith. 1. To decline the king's authority, or impugn the authority and dignity of the three estates of parliament: 8 James VI. c. 129 and 130. 2. For any of the king's subjects, upon any pretext, to rise and continue in arms, to maintain strengths, forts, or garrisons, to make peace or war, or to make treaties or leagues with foreign princes or states, or among themselves, without his majesty's special authority first interposed: Charles II. p. 1. s. 1. c. 5, 1661. 3. If any person shall plot, contrive, or intend death or destruction to the king's majesty, or any bodily harm tending to his death or destruction, or any restraint upon his royal person, or to deprive, depose, or suspend him from his style, honour, and kingly name of the imperial crown of this realm, or any other of his majesty's dominions, or to suspend him from the exercise of his royal government, or to levy war, or take up arms against his majesty, or any commissioned by him, or shall entice any strangers or others to invade any of his majesty's dominions, and shall, by writing, printing, or preaching, or other malicious and advised speaking, express

or declare such their treasonable intentions, every such person or persons, being, upon sufficient probation, legally convicted thereof, shall be deemed declared and adjudged traitors, and shall suffer forfeiture of life, honour, lands, and goods, as in cases of high treason. This act was passed in 1662 (Charles II. p. 1. s. 1. c. 2) for the preservation of his majesty's person, authority, and government, and very nearly corresponds to the present law of treason.

259. *Homicide and its three degrees.*—Homicide is either culpable, excusable, or casual. The statute of 1 Charles II. c. 22 (1661) treats of the two latter. It ordains that casual homicide in lawful defence, and homicide committed upon thieves and robbers breaking houses in the night, or homicide at the time of masterful depredation, or in the pursuit of denounced or declared rebels for capital crimes, or of such as assist and defend rebels and masterful depredators by arms and by force oppose the pursuit and apprehending of them, shall not be punished by death; provided always that the judge, in cases of homicide casual and in defence, may, with the advice of the council, impose a fine upon the manslayer to the use of the defunct's wife and bairns, or nearest of kin, or may imprison him.

260. *Adultery and rape severely punished.*—During the reigns of Queen Mary and James VI. various enactments shew that adultery was severely punished, i.e. not merely by church or other censures, but by the loss of goods, excommunication, and even death: 2 Mary, p. 5. c. 20. and p. 9. c. 74; 7 James VI. c. 105. ratified William III. p. 1. s. 9. c. 11; 12 James VI. c. 17. and p. 16. c. 20.

As to rape, and its subsequent diminution by the allegation of the woman's consent, *vide* James VI. p. 21. c. 4.

261. *False witness*.—False witness was an offence which was rigorously punished under the statutes of Mary, p. 5. c. 22, and p. 6. c. 46; and James VI. p. 23. c. 22. Thus, the makers, feigners, users, seducers, corrupters, and falsifiers of all evidents, acts, obligations, acquittances, or other writings whatsoever, were to be punished in their persons and goods with all rigour, viz.: prescription, banishment, and dismemberment of hand and tongue. Again, false witnesses and their inducers were to be punished by piercing their tongues, escheat of movables, and infamy, and to be at the judges' discretion. Further, the makers and users of false writs, or those accessory to the making thereof, were to be punished with the pains of falsehood, and the counterfeiter, falsifier, or accessory could not, by passing from the writ quarrelled, free himself from punishment.

These punishments are severe and almost barbarous, and are therefore no longer inflicted; but the offence is sometimes difficult to detect, and often dangerous to the happiness and well-being of society, and therefore demands great severity for its repression.

262. *Theft punished by death, and stolen goods or their value to be restored*.—Death was the punishment of theft in the reign of James VI.; and by Charles II. p. 1. s. 1. c. 26 (1661), the person whose goods were stolen was to have them restored, or the value taken from the thief's readiest goods.

263. *Taking of black-mail punished by death and loss of movables*.—The provisions of James VI. p. 1.

c. 21, are as follows : That securities given to the takers of black-mail shall be void ; that those who take or sit under the assurance of thieves, or pay them black-mail, or aid them with meat and drink, shall lose their movables, and suffer death ; and that leil men should rise against thieves under the pain of being held to be partakers.

This offence was very common in Scotland in the seventeenth century, and this statute indicates the lawlessness and insecurity which then prevailed. Most people in their fear thought it was better to lose a little rather than everything, and to have some protection from the breakers of law rather than to have none from their natural defenders.

264. *Strong beggars and vagabonds to be employed in common works, and houses to be built for their correction.*—The unsettled condition of the country, and the wandering habits of large numbers of the people, called forth several measures for the suppression of strong beggars, vagabonds, and Egyptians, and the employment of them and their children in common works. The execution of these laws was entrusted to the members of kirk sessions, who were long the national guardians of the poor. Moreover by an act passed in 1663 (Charles II. p. 1. sess. 3. c. 16) vagabonds and idle poor persons might be seized and employed at manufactories ; and the parishes in which they were born, or if these were not known, then the parishes where they had lived for the previous three years, were liable to pay two shillings Scots a day for each for three years ; and the masters of the factories might retain them in their service for seven years thereafter for meat and clothes. All these

measures were of little or no avail; and houses of correction were ordered to be erected in certain burghs for idle beggars and vagabonds: Charles II. p. 2. sess. 3. c. 18 (1672). By an earlier act, 22 James VI. c. 10 (1617), the king's lieges might receive the children of indigent parents and keep them in their service till thirty years of age; and by another act, 1 Charles II. c. 42 (1661), teachers in each parish were to be paid for teaching poor children, vagabonds, and idlers to fine and mix wool, spin worsted, and knit stockings.

The principle which runs through all these enactments is, that those who are able and compelled by necessity to earn a livelihood ought not to be a burden to others; that necessaries in the shape of education, food, and clothing should be given to those who have not been taught how to gain an honest living; and that those who wilfully and needlessly persist in being a burden to the community should be punished.

265. *Witchcraft punished by death.*—A statute of 1563 against witchcraft, sorcery, or necromancy declared all who practised such arts, or applied to such persons as practised them, to be punishable by death: 9 Mary, c. 73. The act calls the offence a heavy and abominable superstition, and states that it is contrary to the law of God.

This statute was vehemently desired by the clergy, and by Knox amongst the rest, and was the cause of many wretched women being cruelly put to death. Witchcraft was an offence which fell under the cognisance of the Church, and in 1563 four women were delated by the superintendent of Fife, *i.e.* handed over to the civil power, for witchcraft.

266. *Blasphemy punished by death.*—About a hundred years later (1661) a statute was made against blasphemy : Charles II. p. 1. c. 2. The offenders were those who, not being distracted in their wits, railed upon or cursed God, or any of the Persons of the Blessed Trinity, and obstinately continued so to do. They were to be tried by the chief justiciar, and, if found guilty, punished by death.

267. *Drunkards fined and imprisoned.*—The laws against drunkards were also severe. Thus, in 1617, all persons convicted of drunkenness, or haunting taverns or ale-houses after ten at night, or at any time of the day, except in time of travelling, or for refreshment, had to pay £3, or be put in the jogs or jail six hours, for the first offence ; £5, or twelve hours, for the second ; and £10, or twenty-four hours, for the third ; and if they thereafter transgressed they were to be put in jail till they found caution : 22 James VI. c. 20. The fines were to be appropriated to pious uses, and were made greater by a subsequent act.

268. *Swearing fined.*—It would also appear that swearing was another of our national vices, and fines were imposed according to the quality of the offender. Various acts as to this offence appear in the statute book during the reigns of Queen Mary, James VI. and Charles II. A nobleman was fined £20, a servant 20/-, and a minister one-fifth of a year's stipend.

269. *Forestalling and regretting.*—Forestalling and regretting were still considered offences, and a fine of £40 was imposed for the first offence, 100 merks for the second, and loss of goods for the third. The laws against this supposed offence have long gone into

disuse on the ground that they were useless and frequently injurious. Acts of parliament can no more fix the natural or proper price of goods than of labour.

270. *Conclusion.*—Many things have been omitted which I desired to mention, and many have been treated more briefly than I could have wished. This, considering the great and important period which has been under review, was unavoidable.

I conclude this lecture with these three observations : First, The accession of the Stuarts to the throne of England largely contributed to the prosperity, freedom, and happiness of Scotland. Second, The freedom of individual thought was vindicated by the Reformation, and is, with its fruits, the most valuable contribution made by the Reformed Church to the cause of modern civilization. Lastly, Our civil liberty was strengthened and secured by the Revolution of 1688.

LECTURE V.

FROM THE REVOLUTION TO THE END OF THE REIGN OF QUEEN ANNE
(1688 to 1714).

THIRD EPOCH.—SCOTTISH—THIRD PERIOD.

271. *Outline of this lecture.*—The period with which I have this evening to deal lasted only thirty-six years. But what great events fall to be considered. First, The political, civil, and religious rights of all British subjects had to be defined and protected. Second, The estates of parliament had to settle the succession of the crown upon a new series of heirs. Third, All Roman Catholics were excluded from the succession to the imperial crown of Great Britain. Fourth, A full and complete Union was effected between the legislature and government of the two separate and independent kingdoms of Scotland and England. Lastly, The laws and institutions of our own country underwent considerable alterations and improvements. These subjects, for their complete explication, would require much more time than we, at present, can bestow upon them.

272. *The settlement of the crown.*—As James VII. left the palace of Whitehall, his son-in-law William Prince of Orange entered it. The Prince was asked by the leading men of England to undertake the temporary management of public affairs, and convoke the parliaments of England and Scotland. He complied with this request; and the lords and commons of England, having declared that the throne of England had been abdicated by James VII., conferred the English crown on William and Mary for their joint lives and the survivor of them, and on the heirs of Mary the daughter of James VII., and failing her heirs, on her sister the Princess Anne and her heirs, and failing Anne and her heirs, the heirs of William. William, during his life, was to exercise the royal authority by himself alone. These arrangements were first made by a Convention of the English Estates, and afterwards incorporated into a statute.

A settlement of the Scottish throne was made precisely in the same terms as the English. But there is a remarkable difference between the views entertained in the Scottish and English parliaments as to the legal consequence of James's flight. In England it was held to be an abdication; but here, and more reasonably, a forfeiture. The vote of the Estates of Scotland (*vide* their declaration) asserts that James had made immense efforts to establish popery, had converted the limited monarchy into a despotism, imposed oaths and tests contrary to law, had exacted money and maintained a standing army without the consent of parliament, had put citizens to death without legal trial, had suppressed corporations, had

corrupted and intimidated the bench, and consequently that "he" and his son, afterwards known as Prince Charles Edward, "had forefaulted" their "right to the crown, and the crown is become vacant." This vote was passed on the fourth of April 1689, and seven days afterwards the celebrated Claim of Right was adopted; and, subject to its terms and the limitations expressed in the settlement made by the English parliament, the Scottish crown was offered to William and Mary. Two days afterwards, the Articles of Grievances received the sanction of the legislature, and commissioners were appointed by the Convention of the Scottish Estates to treat with William and Mary, who, except as to some now unimportant reservations, accepted the offer of the kingdom of Scotland, and were accordingly crowned King and Queen of Scotland. Thus the crowns of England and Scotland passed away from James VII. and his son, and became vested in the House of Orange and the Princess Anne, and were afterwards settled upon the House of Hanover.

273. *The main provisions of the Claim of Right and of the Articles of Grievances.*

The Claim of Right declares that, by the law of this kingdom, no papist can be king or queen of this realm; nor can any Protestant successor exercise the regal power until he or she take the coronation oath. Then, passing over the assertions as to popery, now of no importance, this priceless vindication of our ancient rights and liberties asserts, and asserts truly, that the acts I am about to mention are contrary to law:—

1. All proclamations asserting an absolute power to cass, annul, and disable laws.

2. Giving grants or gifts for raising money without consent of parliament or the convention of the estates.

3. Putting the lieges to death summarily, without legal trial, jury, or record.

4. Imprisoning persons without expressing the cause thereof, and delaying to put them to trial.

5. Nominating and appointing the magistrates, councils, and clerks in burghs, contrary to their liberties and express charters.

6. Sending letters to the courts of justice ordering the judges to stop or desist from determining causes, or ordering them to proceed in causes depending before them, and changing the nature of the judges' gifts of their appointments from *ad vitam aut culpam* into commissions *durante bene placito*.

7. Granting protection for civil debts; and

8. Using torture without evidence, or in ordinary crimes.

It further declares,

9. That prelacy is, and hath been, a great and insufferable grievance and trouble to this nation, and contrary to the inclinations of the generality of the people ever since the Reformation.

10. That it is the right and privilege of the subjects to protest for remedy of law to the king and parliament against sentences pronounced by the Lords of Session, provided execution of the sentence is not stopped.

11. That it is the right of the subject to petition the king.

12. That, for redress of grievances, and for the amending, strengthening, and preserving of all laws, parliaments ought to be frequently called and allowed to sit, and freedom of speech and debate secured to the members.

The Articles of Grievance, besides laying claim to some of these ancient rights and liberties, contain a condemnation of the parliamentary committee called the Lords of the Articles, of the statute which authorised Charles II. to impose custom on foreign import and trade at his pleasure, and of levying or keeping on foot a standing army in time of peace without the consent of parliament.

THE ROYAL PREROGATIVES.

274. *The coronation oath of William and Mary.*—William and Mary, having accepted the crown of Scotland at the hands of the Scottish commissioners, the coronation oath, drawn up by the Scottish estates, was administered to them. The document contained a promise to maintain the true religion then received and preached within the realm of Scotland; rule the people according to God's Word, and the laws and constitutions of Scotland; preserve the rights, rents, and privileges of the crown, and not transfer or alienate the same; repress all kinds of wrong; administer justice to all without exception; and root out all heretics from the lands and empire of Scotland.

275. *Oaths of allegiance and assurance.*—In 1693, (William and Mary par. 1. sess. 4. c. 6) an act was

passed for taking the oaths of allegiance and assurance by all persons in public trust—civil, ecclesiastical, and military—and imposing disarmament, fines, imprisonment, and banishment on all who refused to take them, and authorising the privy council to proceed to a due and rigorous execution of the act. The oath of allegiance is very brief, and contains a simple promise and oath to bear faithful and true allegiance to the sovereigns William and Mary. The oath of assurance, which was aimed at the papists and the supporters of the late king, and intended for the support of the Presbyterian form of worship then legally established in Scotland, contained an acknowledgment that William and Mary were lawful sovereigns of this realm by right and in fact, and also an engagement to maintain their majesties against all their enemies, and particularly against the late King James and his adherents.

276. *Settlement of the Scottish crown on the House of Hanover by the Union.*—On the death of King William III., who survived his wife Queen Mary, the Princess Anne, according to the act of settlement, and subject to all its conditions and restraints as fixed and determined by the Claim of Right and the Articles of Grievance, ascended the throne of Great Britain in 1702, and her majesty's royal authority was accordingly recognised by the estates of the Scottish parliament: Anne p. 1. s. 1. c. 1. As afterwards explained, Queen Anne had the honour of uniting England and Scotland under one government and one legislature; and, on her demise, she was succeeded to the British throne by George I. of the House of Hanover.

277. *The divine right of kings finally rejected by our laws.*—The divine right of kings as claimed by James VI. and James VII. and Charles I. and Charles II. was thus finally rejected by the nation, the sovereignty of the laws vindicated, and liberty placed on a true and sure foundation. May our sovereigns ever remember that their greatest honour consists in their being the supreme heads of a great, free, and industrious people ; and that the nation has ever loved, honoured, and obeyed all their monarchs who sought the happiness and prosperity of their subjects as the highest objects of their ambition.

278. *The royal income and expenditure.*—In early times, the kings of Scotland had considerable landed possessions, and the revenues from these, along with the feudal casualties and services, and the fines imposed on offenders in the king's courts, and some slight customs and excise duties, were amply sufficient for all the branches of the public service. Moreover, the forfeitures of landed estates long brought large sums into the royal exchequer ; but, in the progress of time, and as peace and security were better maintained, this source of revenue became less productive. As we have already seen, numerous attempts were made to restrain the excessive prodigality of the sovereigns in disposing of the royal domains to their favourites, but all of them failed, and the sovereign was daily more and more dependent on the general taxes, which, under the authority of parliament, were collected from the community. Amongst the sources of revenue in existence about the time of the Union were a cess or tax on land, poll money, an excise duty on beer and

ale and other articles, and a custom duty on exports and imports. At the Union the tax on excisable liquors in Scotland produced £33,500, the customs £30,000, the land tax £36,000, and the total revenue was £160,000. The national debt did not exceed the latter sum.

279. *The national forces.*—In some form or another, provision must be made in every well-governed country for the defence of the nation against the enemies of the public tranquillity both at home and abroad. In ancient times, the military forces of the kingdom were composed of the king's feudal tenants, and afterwards of a royal standing army. I therefore propose briefly to explain the changes by which the feudal army was abolished, and a royal standing army was established.

280. *The decay of feudalism followed by the establishment of standing armies.*—According to the feudal theory, each freeholder was the guardian of the peace within his own boundaries, and all the vassals of the king were liable, according to the extent and value of their lands, and without pay or reward, to serve in the king's army for a certain number of days every year. But, as the feudal spirit began to grow weak, and as standing armies became a prominent feature on the continent and in England, it was found that the feudal system in Scotland was insufficient to provide in a suitable manner for hostilities which required much time and unity of action.

281. *The militia of Charles II. and the rudiments of a regular army of William and Mary.*—After the restoration of the Stuarts, the Scottish parliament in

1661 authorised Charles II. (p. 1. s. 3. c. 26) to call out 20,000 foot and 2,000 horse, armed and furnished with forty days' provisions, apportioned amongst the several counties, to be in readiness at his majesty's word of command ; and, if necessary, all males between sixteen and sixty. The regulations of this force were first settled by the king and his council, and then sanctioned by parliament. Subsequently, the legislature declared that the officers of the militia must be well affected towards the religion and government then established, and take the oath of allegiance, and that those who served in the militia should be exempt from all other levies during their service.

The national forces, *i.e.* the militia, received a further development in the reign of William and Mary ; for these sovereigns were allowed to levy a force of 2,979 men in the shires and burghs of Scotland in exchange for a suspension of the right to call out the militia for a year and a half, except in the event of actual rebellion. By subsequent acts, additional levies were authorised ; and, since the great Revolution, a standing army has become an established institution in this kingdom ; and, guarded as it is by the jealousy and power of the Houses of Parliament, and especially by the power of the Lower House over the national exchequer, has largely contributed to the stability and liberties of the country.

282. *The nature of the militia service.*—The service in the militia was compulsory, and no exception was allowed, unless by means of substitutes. But, for the additional levies to which I have referred, it is expressly enacted that the idle and unmarried who

earned daily wages should be first placed on the list ; that lots should be cast to decide who were to serve ; that the term of service should be three years ; and that the king's officers should not press any others, under the pain of being held guilty of oppression, and being fined.

283. *Quartering of soldiers.*—In consequence of the abuses which arose from the quartering of soldiers upon the lieges, stringent regulations were drawn up in 1693 (William and Mary par. 1. sess. 4. c. 4) by which those who made up false muster-rolls were to be severely punished ; free quarters were absolutely forbidden to be taken ; and provision was made for paying the royal forces. Five years afterwards, another attempt was made to stop the abuses then prevalent in consequence of the existence of the army ; free quarters were again forbidden ; and those upon whom soldiers had been quartered, in consequence of their not having paid their taxes, were to be relieved as soon as they paid them to the collectors.

Before the Act of Security was passed in 1706, the regular troops in Scotland amounted to 2,934, and of these 53 were mounted and 324 in garrison. Till the Union, the English forces had, of course, no right to be in Scotland ; for, up to that time, England and Scotland were two independent, sovereign countries.

PARLIAMENT.

284. *Elements not changed.*—During this period, the Scottish parliament underwent no change in the

estates of which it was composed, and these, you will remember, were the king, with his nobles, and the commissioners from the counties and burghs. It was still essentially the king's court, and was composed of the king's tenants, and of these alone; and those who owed suit and service in this court were liable to heavy fines for absence from the assembling of parliament and its sittings, and even for not appearing at the daily calling of the rolls: William and Mary p. 1. s. 3. c. 1 (1690).

285. *Always in one chamber, and its members arranged by ranks.*—The Scottish parliament, from first to last, sat in one chamber, and its members were arranged according to their rank. Near the throne sat the chairman surrounded by the officers of state, and at the upper end of the hall was a bench for the nobles. In the centre were the judges of the Court of Session and the clerks of parliament, and lower down were the lesser barons and the burgesses. All had appropriate robes, and gave their votes on the calling of the rolls, and not by separating the members as is now done in the British parliament. The mode of conducting business was quaint and unscientific; and, till near the Union, the direct negative or affirmative vote was unpractised. The voting was usually settled before the meetings of the assembly.

286. *State officials sat in the parliament, and the Lord Clerk Register drew up the statutes.*—The chief officers of the government and the judges of the Court of Session had seats in the parliament by virtue of their offices, and could speak and give advice in the chamber; but, unless they were members of the House

by hereditary right, writ or patent, or election, they had no votes. The Lord Clerk Register drew up the statutes at the end of the session in accordance with his views of the general votes and resolutions of the House, and sometimes boasted that he was entitled to some recognition from the king for the manner in which he had discharged his duty to the public. This state of matters caused the members of the parliament of the Revolution to make an abortive attempt to put their resolutions into final shape. It will thus be seen that the Scottish parliament was deprived of the great advantages which arise from a reconsideration of proposals by means of two separate and independent bodies such as the present British Houses of Parliament. This peculiarity explains many of the inconsistencies of the Scottish parliament in its latest days ; and, had it not been for the existence of the much condemned committee called the Lords of the Articles, parliament would have become as impotent in Scotland as in France before the great French Revolution. Parliamentary government is impracticable without two legislative chambers, and becomes unworkable when the power of veto does not reside beyond the sphere of both.

287. *County representation increased.*—Complaints having been made to William and Mary that the representation in Parliament was unequal, and ought to be redressed, an act was passed in 1690 (William and Mary p. 1. s. 3. c. 11), by which two additional representatives were given to fifteen of the larger counties of Scotland. This increase in the representation, I ought to observe, was based on the

largeness, extent, and value of the lands held from the sovereign by the barons and freeholders within the shires mentioned in the act.

288. *Parliamentary electors and the oath of allegiance.*—By William and Mary p. 1. s. 2. c. 4 (1690), the electors of all commissioners in parliament before they give their votes, were obliged to take the oath of allegiance. When the oath was not sworn, the vote was worthless, and the offending voter was fined one thousand merks.

289. *Statute as to the Lords of the Articles repealed: Laws not to be passed at the first sitting.*—Two important statutes as to the management of parliamentary business deserve to be here mentioned. The first is the act as to the election of committees in parliament: William and Mary p. 1. s. 2. c. 3 (1690); and the other as to laws not being passed by the chamber at the first reading: William p. 1. s. 6. c. 10 (1696). The first repealed the statute of Charles II. by which the Lords of the Articles were made subservient to the royal will, and enacted that parliament might choose and appoint committees of what number they pleased, provided there was an equal number chosen of each estate for preparing all motions and overtures; that the parliament might alter these committees, and discuss all matters whatsoever in the house itself as was thought fit; that the king's officers of state might be present at the meetings of such committees, and freely propose and debate, but not vote; and further, and as a special privilege, that the nobles might choose such of their own bench as were officers of state. The second statute, to which I

have just referred, ordained that any law to be made thereafter should not be concluded and voted in that sitting in which it was first read, but that the same should lie on the table till another sitting, in order that the members might consider thereon in the meantime. The value of this statute was incalculable. In the British Parliament, or, at all events, in the Lower House, it is most difficult to get a bill through the third reading; but in the Scottish parliament acts were sometimes pushed through with more haste than wisdom.

290. *Summary of the parliamentary rights at the Union.*—I now sum up the result of the inquiries which I have made as to the Scottish parliament as at the date of the Union. It was the king's high court. It was composed of the sovereign and his vassals or tenants in chief, and their deputies. It had surrendered its judicial functions to the Court of Session without the right of appeal, but it was the highest and only supreme legislature of the country. It had appropriated to itself the levying of all taxes upon the subjects of the realm, and had and did take cognisance of all great public wrongs and remedies within the kingdom.

THE CHURCH.

291. *Presbyterianism re-established.* — Prelacy having been established by Charles II. and having continued till the Revolution, it was declared by the Convention of Estates to be a grievance. It was therefore abolished in 1690, and their Majesties William

and Mary promised that they would legally settle that form of church government which was most agreeable to the inclination of the people of Scotland (p. 1. s. 1. c. 3). Accordingly, by William and Mary p. 1. s. 2. caps. 1, 2, and 5, the statute of Charles II., asserting the king's supremacy over all persons and in all causes ecclesiastical, was repealed as inconsistent with the Church Establishment desired in Scotland; the Presbyterian ministers thrust out of their the churches from the 1st of January 1661 were restored; the Confession of Faith was ratified; and the Presbyterian form of Church government was established in Scotland. The words of the act are these: "Do establish, ratify, and confirm the Presbyterian Church and discipline, that is to say, the government of the Church by kirk sessions, presbyteries, provincial synods, and general assemblies, ratified and established in 1592, and thereafter received by the general consent of this nation to be the only government of Christ's Church within this kingdom."

Arrangements were made for supplying the Churches with suitable ministers; and the General Assembly was recognised as an institution of the Church for trying and purging out all insufficient, negligent, scandalous, and erroneous ministers, and for redressing all Church disorders. Patronage was afterwards to be considered.

292. *The Confession of Faith as to the civil magistrate, and the conditions of the Church's endowments.*—By chap. 23. § 3. it is laid down in the Confession of Faith that the civil magistrate "hath authority, and it is his duty, to take order that unity and peace be preserved in the Church; that the truth of God be kept

pure and entire ; that all blasphemies and heresies be suppressed, all corruptions and abuses in worship or discipline prevented or reformed." With the exception of maintaining the Reformed Church, none of these alleged duties are now attempted by the civil magistrate of this country.

These principles were adopted, because it was thought that the Church was an indispensable branch of civil government ; and they are now rejected by some, because, as they say, the Church is really nothing more than a great civil corporation upon which the nation has conferred certain powers to rule and govern its own members, and, as stated in the acts of parliament establishing the Church, which holds certain endowments as a gift from the nation for "the security of the true Protestant religion according to the truth of God's Word," and for "the government of Christ's Church within this nation, agreeably to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishment of peace and tranquillity within this realm."

293. *Laws against non-conformity to the Episcopal Church, &c. repealed.*—The following statutes were repealed at the establishment of Presbyterianism, namely, all the acts of parliament imposing civil penalties in cases of excommunication ; all statutes made since 1661 against non-conformity to the Episcopal Church ; against ministers being introduced into churches without legal call and admission ; and against baptism and marriage being celebrated by ministers who had been put out of their charges.

The laws as to the Protestant religion and the Presbyterian form of government were ratified by William and also by Anne: William par. 1. sess. 1. cap. 3 (1700); Anne p. 1. s. 1. c. 2 (1702); p. 1. s. 2. c. 2 (1704); and p. 1. s. 4. c. 6 (1706).

294. *Laws against popery.*—By a proclamation, issued by the Convention of Estates (1689, c. 5), all papists were declared incapable of holding any civil or military trust, ordained to give up their arms, and restricted as to their dwelling places. Afterwards, in 1700 (8 and 9 William p. 1. c. 3), an act was passed for preventing the growth of popery; and an oath, repudiating all the usual doctrines of the Church of Rome, was appointed to be taken by certain persons who were supposed to be dangerous to the Protestant religion. This act confirmed the statutes made in the reign of James VI. against popery, the Jesuits, and the mass. It was directed against all papists, even although in minority, who should succeed to or purchase land. It substituted Protestants for papists as heirs in heritage, and declared Roman Catholics incapable of making voluntary dispositions of their real estate. It also forbade papists to teach any art or science, or exercise any art, or even act as domestic servants. Further, strange to say, persons under fifteen years of age might be called upon to purge themselves of popery by taking an oath in which they denied, disowned, and abhorred such doctrines as the pope's infallibility, transubstantiation, and purgatory. This oath was to be made from the heart and in the presence of God. Surely absurdity could hardly be carried to a greater length.

The Protestant Church had been established in the country for the advancement of "true piety and godliness," and yet men, nay even children, were in the sight of Almighty God to make oaths full of hypocrisy, deceit, and falsehood, or lose their worldly possessions. These laws were cruel, oppressive, and unjust; cannot be defended on the basis of a rational system of civil government; are subversive of all right notions of religious freedom and toleration; and prove that our Protestant forefathers in the time of the Reformation were utterly ignorant of the means by which honesty and true godliness can flourish in any country, or make a people truly great. I decline to accept the safety of the State as a justification of these infamous laws, and am thankful that persecution for religious opinions is now impossible in this land of civil and religious freedom. Now at least, and for a long time, the principles of the Reformation have been accepted, in their full bearing, as a cardinal doctrine, and all are agreed that one's religion is to be decided by every individual conscience, and is not to be determined by the State in any case whatever. True religion has nothing to fear from education, science, and learning; but it has suffered much from ignorance, bigotry, and superstition.

295. *Church patronage*.—The right of patronage was not long allowed to remain unsettled; for it was abolished by the legislature in the same session as the re-establishment of the Presbyterian system of church government: William and Mary p. 1. s. 2. c. 23 (1690). The statute by which this grievance was, for a short time, brought to an end, declared "that in

case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the parish, being Protestants, and the elders, are to name and propose a person to the whole congregation, to be either approved or disapproved by them ; “and if “they disapprove, that the disapprovers give in their “reasons to the effect the affair may be cognosced upon “by the Presbytery of the bounds, at whose judgment, “and by whose determination, the calling and entry of “a particular minister is to be ordered and concluded.” Compensation was to be given to the patrons for the loss of their legal rights.

This was a wise law, and in perfect harmony with the wishes of the nation then and ever since. British legislators, however, a few years afterwards, and in the latter part of Anne’s reign, resolved to carry out their spite against the Presbyterians, and their dislike to the Scots generally ; and, at the instigation of the Queen’s ministers, repealed this act, restored patronage, and thus caused many serious quarrels and disturbances in the Church and the State for more than a century. Patronage was abolished by the Conservative Government now in office.

296. *Remarks on the Church.*—The Presbyterian Church of Scotland has been established by law for more than two hundred years ; and, in all essential points, remains what it was when finally established. That it has performed its part of the contract with the State cannot be denied ; and, although the forces which are arrayed against it may ultimately prevail, it will long be remembered by all true-hearted Scotchmen as a glorious institution, which has nobly fought against

falsehood, immorality, and sin, and will fall, if fall it must, amidst the sincere and well-founded regret of many both in this country and abroad.

I hope the Established Church of Scotland will long remain an essential part of our Constitution ; for I firmly believe that it is closely—I cannot and will not say inseparably—connected with our civil and religious liberty.

THE ADMINISTRATION OF JUSTICE.

297. *Judicial corruption a grievance.*—One of the grievances of the Convention of Estates was, that the fountains of justice were polluted, and the lives, property, and estates of the people taken away contrary to law. This complaint was too well founded. The condition of the bench in the Court of Session, the supreme civil court of the land, was deplorable. This partly arose from the unjust interposition of the extraordinary lords of session in many of the cases in which their friends and supporters were expressly concerned, and in which the ordinary judges were overruled by the minions of the insolent and reckless court of the Stuarts. This disgrace has not existed amongst us for considerably more than a century ; and, although some of the unpaid magistrates play some fantastic tricks in the exercise of their authority, there is not a country in the world where justice is better administered than in our own. From the highest to the lowest, all our judges have a most scrupulous desire to dispense justice to all Her Majesty's subjects without fear or favour, hatred or reward.

298. *Trial of criminals to be public.*—The general rule of all the courts in Scotland is, that all criminal trials ought to be public. This is a very wise and excellent rule. So long ago as 1587, it was ordained that the whole accusation, reasoning, and evidence should be given in open court, in presence of the party accused and in the face of judgment: 11 James VI. c. 90. Again in 1693 it was ordained that the judges of justiciary should advise on the relevancy of criminal libels with open doors in presence of the panel and assize and all others; and that none should interrupt the court under pain of fine and imprisonment at the judge's discretion: William and Mary p. 1. s. 4. c. 27.

299. *Exception in rape, &c.*—To this, however, there is a most valuable and judicious exception, by which, according to use and custom, during trials for rape, adultery, and the like, all persons, except the parties and the procurator at the leading of the proof, may be removed from the court.

300. *Justiciary judges to receive salaries.*—In 1704 provision was first made by parliament for salaries to the judges of the Justiciary Court: Anne p. 4. s. 1. c. 5. These judges were, as you may recollect, to be five in number, elected from the Lords of Session. The Lords of Session had a salary of £4,800 Scots each, and parliament added £1,200 Scots to the salary of each of those who acted as judges of justiciary.

301. *Additional judges of justiciary for the Highlands.*—William and Mary in 1693 were authorised to appoint one or more justiciars for limited periods,

in order to repress the depredations and robberies committed in the Highlands, whereby great injury and ruin had fallen upon many peaceable subjects, and reproach cast upon the government. With the view of putting an end to the scandalous lawlessness of the Highland clans and their chieftains, all sovereign criminal jurisdictions, with the exception of those of the chief justiciar of Argyle, were suspended. All such jurisdictions were finally abolished in the reign of George II.

302. *Land Registers*.—The admirable system of registration of rights connected with land was brought to perfection in 1696: William p. 1. sess. 6. c. 18. By that statute, it was declared that no seisin or other writ or diligence appointed to be registered should be of any force or effect against any except the granters and their heirs, unless duly booked and inserted in the register; and, where there was any omission or negligence, the keeper of the register was liable in damages for the injury sustained. An act was also passed in 1696, declaring that, notwithstanding any law or custom to the contrary, all writs which were registrable might be registered as fully and effectually after the granter's death as before: William p. 1. s. 6. c. 39.

Let me now refer to the Civil and Criminal Laws enacted during the period under consideration.

LAWS, CIVIL AND CRIMINAL.

First—Civil.

303. *Effect of forfeiture for treason*.—For the security of creditors, vassals, and heirs of entail of

persons forfeited, it was, by William and Mary p. 1. s. 2. c. 33 (1690), declared that no forfeiture thereafter should any ways prejudice the tacksmen, creditors, superiors, vassals, or heirs of entail thereinafter mentioned, nor husbands or wives of the persons forfeited, but that all tacks clad with possession before committing of the treason where the treason was open and notour, or before the citation in the process of forfeiture where the treason was latent, should defend against the forfeiture of the settler, his heirs and successors, the debt being always upon record, by being registered, or diligence done thereupon.

304. *Creditors of forfeited estates.*—By a subsequent statute, William p. 1. s. 6. c. 24 (1696), his majesty was authorised to bring all the creditors of forfeited estates before the Lords of Session; and, after all the creditors had sufficient land given to them in payment of their debts, the King was to have the surplus of the traitor's estate adjudicated to himself.

305. *Back bonds to contain granters' names.*—Another statute, William p. 1. s. 6. c. 25, made invalid all back bonds and other deeds in which the names of the granters were left blank, and declared that no action of declarator of trust should be sustained as to any deed of trust made thereafter, except upon a declaration or back bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator should be intended, or unless the same should be referred to the oath of the party *simpliciter*.

306. *Entrance upon a predecessor's heritage cum beneficio inventarii*.—It would appear that many frauds and much disappointment had been caused to creditors by heirs-apparent entering upon their predecessors' lands, and defeating the just debts of the last possessors of real estate. Therefore, while defining the responsibility of the heirs more rigidly than before, the statute ordained that any heir-apparent should have free liberty and access to enter to his predecessor's heritage *cum beneficio inventarii*, or upon inventory as use was in executories of movables, allowing at the same time to the apparent heir a year and day to deliberate as to how he should act, and to make up a full and particular inventory, upon oath, as to all lands, houses, annual rents, or other heritable rights whatsoever, to which he might pretend to have right to succeed: William p. 1. s. 5. c. 24 (1695).

307. *Creditors as executors dative*.—An important and useful act was also passed as to the mode to be adopted in affecting movables for the debts of deceased persons, and also of the next of kin: William and Mary p. 1. s. 5. c. 41. The effect of this Act is (1), that creditors may get themselves decerned executors dative to the defuncts; and (2) that the deceased's debts, upon which diligence has been taken, are preferred to the debts of the next of kin.

307. *Next of kin and their representatives as vitious intromitters*.—The law as to vitious intromission was also improved by the Act of William and Mary p. 1. s. 6. c. 20. This statute ordained "That the nearest of kin, and others their intromitters with the movables of the defunct, who are not executor-creditors

confirmed, nor have right from the executor-creditors before intromission, shall be liable as vicious intromitters, notwithstanding that there is a third party confirmed in a particular deed or subject."

308. *Liability of paternal tutors and curators.*—By an act passed in 1696 as to the nomination of tutors and curators by fathers to their children, it was made lawful for a father in his liege pouste to nominate tutors and curators to his children, and exempt them from the responsibility of being each liable for the acts of all, and to declare that each should be liable only for himself: William p. 1. s. 6. c. 8.

309. *Creditors to aliment incarcerated poor debtors.*—Imprisonment on civil process was restricted by William p. 1. s. 6. c. 32. This act laid down that, where a person was confined in prison for a civil debt, and was unable to maintain himself, the magistrates of burghs might, on the prisoner's application, compel the incarcerating creditor to provide three shillings Scots a day for the prisoner's aliment, or consent to his liberation. If the creditor did not pay for the prisoner's maintenance, the magistrates might set the prisoner at liberty.

310. *Minors not to be imprisoned during pupilarity.*—For the protection of minors, the legislature ordained in 1696 that no minor within the years of pupilarity should be liable to caption awarded for any debt or civil cause; and declaring all such minors, in respect of their nonage, and during their pupilarity aforesaid, to be exempted and freed from the same: William p. 1. s. 6. c. 41.

Second—Criminal.

311. *Treason restricted.*—In my last lecture, I took occasion to condemn the looseness with which treason was applied in Scotland. I have now to say that in 1703 the punishment inflicted by many of the acts upon leasing making and slander, not involving treason in the modern sense, were repealed, and fines, imprisonment, or banishment substituted. If the offender was very poor, he was to suffer corporal punishment, but his life and limbs were always to be preserved: Anne p. 1. s. 1. c. 4.

312. *Concealment of pregnancy.*—A severe law was passed in 1690 in order to suppress the frequent murders, or suspicious deaths, of infant children. It enacted that, even although there was no appearance of wound or bruise upon the body of the child, a verdict of concealment of pregnancy, resulting in the death of the child, was sufficient to justify a sentence of death against the mother: William and Mary p. 1. s. 2. c. 21. The execution of this act, however good its object, was most unsatisfactory; for juries, in order to prevent the infliction of an excessive punishment, often wilfully perjured themselves by finding the libel not proved, and thus allowing offenders to escape punishment for a diabolical act.

313. *False coining and clipping the current coin.*—By William p. 1. s. 6. c. 42 (1696), the crime of false coining, and clipping money or coin allowed to be current in Scotland was punished by death and confiscation of movables. The reason assigned for the

punishment was the frequency and heinousness of the offence.

314. *Robbing the post-mails.*—During the Commonwealth, the post-office was founded in Scotland; and in 1690 persons robbing or seizing the mail, or packet, or the letters going or coming by the common post or any other expresses, were declared to be guilty of robbery, and punishable by death and confiscation of movables. The reason given for the severity of the punishment was the injury done to the government and commerce of the kingdom by this kind of robbery: William and Mary p. 1. s. 3. c. 3.

315. *Principals and seconds as to intended duels.*—In 1690 (William p. 1. s. 6. c. 35) principals and seconds in duels, even although no actual fight took place, were to be banished, and their movables confiscated: William p. 1. s. 6. c. 35. This statute was declared to be without prejudice to the act of James VI. p. 16. c. 12, by which those who fought duels, without the king's consent, were liable to capital punishment and escheat of movables, and the provoker was to suffer the most ignominious death.

316. *Blasphemy and profanity.*—Several statutes were passed, during this period, against blasphemy and profanity, and fine and imprisonment, and even death, were inflicted upon offenders: 1693, c. 40; 1695, c. 11; 1696, c. 31. In 1696 one Thomas Aikenhead, aged eighteen, was charged with blasphemy. He was tried by the High Court of Justice and condemned. In two appeals he recanted and professed belief in the Presbyterian Church doctrines, and yet suffered death by hanging. Surely this was a case in which the royal

clemency might well have been exercised. Who was to blame that it was not? I am afraid the Church, and not the King.

317. *Clandestine and irregular marriages.*—By the laws and customs of this kingdom, and by the constitutions of the Church, marriage was solemnised by the ministers of the Gospel duly authorised by law and the Established Church of the nation. With the object of enforcing a regular celebration of marriage according to law and practice, a statute was made in 1698, William p. 1. s. 7. c. 6, as to clandestine and irregular marriages, and for the more stringent enforcement of the laws made in 1661 and 1695, by inflicting fines and imprisonment on the offending parties, the celebrators, and the witnesses. *E.g.* for refusing, when required, to tell who celebrated the marriage, a nobleman was fined £2000; each baron and landed gentleman, 2000 merks; each gentleman and burgess, £1000; each other person, 200 merks. These fines produced the same result as all excessive penalties for offences. These laws both as to fine and imprisonment have long been abrogated by disuse.

318. *Wrongous imprisonment and undue delay in trials.*—The act against wrongful imprisonment is one of the most important in our statute book, and affords most effectual protection against injustice and oppression. It was passed in the reign of William III. and is c. 6. sess. 8 and 9. p. 1 (1700). That it was not uncalled for may be easily gathered from the case of a political offender called Payne, who had been previously put to the torture, and kept in prison for ten years, without trial.

The main provisions of the statute are these :

1. "That informers shall sign their information, and no person be imprisoned for custody in order to trial for any crime or offence without a warrant or writ expressing the particular cause for which he is imprisoned."
2. "That all crimes not inferring capital punishment shall be bailable."
3. "That the judge competent, if the offence be bailable, shall fix the amount of caution within twenty-four hours after the presentation of the petition."
4. "That, upon intimation by the prisoner, a diet must be fixed for his trial within sixty days after the intimation, and the trial take place within forty days thereafter if before the lords of justiciary, and within thirty if before any other judge ; and if the prosecutor do not insist in the trial on the day appointed, the prisoner shall be immediately liberated ; and, if no process be raised against the prisoner within the time allowed, or if not insisted in under the same condition, the prisoner shall be entitled to his release on letters issued within twenty-four hours after complaint is made to a competent judge."
5. "That, after liberation, it shall not be lawful to imprison the same person for the same crime."
6. "That a longer period of detention is allowed in case of treason."
7. "That in case of imminent or actual insurrection or rebellion, commitments may proceed by order of the Privy Council, or any five of their number, upon suspicion of and accession thereto, without their being liable to any penalty for the said commitment, the person imprisoned having always his relief for trial or liberation as already mentioned."
8. Heavy damages, according to the rank of

the prisoner, are payable by those who offend against this statute, and loss of their office, and incapacity of holding an office of public trust, are also to be inflicted.

319. *Concluding remarks on the Scottish Constitution.*—The Constitution of Scotland was essentially that of a limited monarchy, and the crown had, for five centuries, uninterruptedly descended to the legal lineal heir. Although it is not an uncommon opinion that Edward I. unjustly gave judgment in favour of Baliol and against Bruce, this notion is erroneous. In truth, the principle which Edward adopted in the famous litigation about the succession to the Scottish throne has always been since followed. The rule laid down by Edward was, that in the succession to a feudal estate the grandson of an elder daughter ought to be preferred to the son of a younger daughter.

According to the Scottish constitution, the sovereign was bound to maintain the established laws and customs of the realm, and had no right to alter them without the authority and sanction of a court composed of his vassals in chief, or their regularly appointed deputies. He was the fountain of honour and dignity. He was entitled to appoint the supreme judges, the sheriffs, and many other officials. He issued writs, original and appellate, prosecuted offences for high crimes and misdemeanours, and even pardoned offences against the public. Briefly, he was the supreme head in the administration of justice. He was also the commander-in-chief of the national forces both by sea and land. But as regards the highest functions

of government in peace or war, *i.e.* in matters of a judicial and military nature, and treaties with foreign princes, the king's court claimed and often exercised a most potent influence.

To aid the king in the performance of his high duties and exalted prerogatives, he had his high court of parliament, his supreme judges, his officers of state, and privy council. To all these I have already sufficiently referred. I have therefore merely to add that the principles of the Scottish Constitution are admirably and succinctly expressed in the Petition of Right and the Articles of Grievance. The fundamental doctrines therein contained, and of which I have already given you the chief provisions, have never been seriously attacked since the Revolution. These famous documents, recognised by our Sovereigns, and acted upon for many generations, remain to us and all our posterity as the monuments of the liberties of our ancestors, and as the safeguards of our civil and religious freedom.

I have now finished what I had to say as to the Government, Constitution, and Laws of Scotland till the Union, and have to ask you to give me your attention while I briefly state the chief causes which immediately brought about the Union of Scotland and England, and specify the main provisions of the treaty of Union.

UNION OF SCOTLAND AND ENGLAND.

320. *Immediate causes of the Union.*—At the beginning of his reign, William III. with his usual sagacity,

at once perceived that a legislative union between Scotland and England was essentially necessary in the interests of both kingdoms. On this point, the sagacious Marlborough and all the great statesmen of both Parliaments agreed with the King. Accordingly in 1689 commissioners were appointed by the Estates of Scotland to meet commissioners of the English Parliament, and treat concerning the Union of the two countries; and, in a letter from the Scottish Estates, offering the crown to William and Mary, the King is thanked for promoting the Union, and a hope is expressed that the two countries may become one body politic, one nation, and be represented in one Parliament. William was not destined to see his wishes consummated. Dying in 1702, he left his great undertaking to be successfully carried out by his successor.

Several causes prevented the Union from being accomplished in the reign of William III. Perhaps the chief of these were the following :

1. The English were very jealous of the Scots as competitors with them in the advantages of foreign commerce, and the latter were determined not to be deprived of those advantages ; and accordingly, by an act of the Scottish Parliament, Anne p. 1. s. 1. c. 8 (1703), a charter of incorporation was conferred upon a company, which was to carry on trade with Africa and the Indies. Large sums were subscribed in Scotland and elsewhere for the undertaking ; great preparations were also made ; a piece of land in the isthmus of Darien was fixed on as the head-quarters of the company ; and a colony was there planted. But, in con-

sequence of the hostility of the Spaniards, who claimed the land taken by the company, of the opposition of the English merchants, who became alarmed about their trade to India, and of the weakness and vacillation of the King himself, this speculation, from which much good had been anticipated, turned out a gigantic failure. Although this disaster showed the necessity for the Union to be greater than before, it really prevented the requisite steps from being taken.

2. The English Navigation Act treated the Scots as aliens, and this also caused much heart-burning in this kingdom.

3. Shortly after the accession of Queen Anne, when it became imperative to make a re-settlement of the kingdom, the Scottish Parliament, instead of settling the crown on the House of Hanover, as the English Parliament had done, passed an act for the security of the kingdom—Anne p. 1. s. 2. c. 3 (1704)—by which it was enacted that, at the Queen's death, the Parliament of Scotland was to meet and choose her successor to the Scottish throne, and that such successor was not to be the Sovereign of England, unless there should be such conditions of government settled as might secure the liberty and the trade of the nation from being injured by England.

4. In the year 1705 a council was elected, with most extensive powers of inquiry, punishment, and administration as to matters of trade and the Scottish commerce: Anne p. 1. s. 3. c. 3.

5. Fortunately in the same year (1705) the Scottish Parliament agreed to make a treaty with England of and concerning such matters, causes, and

things as should be thought necessary for the honour of Her Majesty, the common good and welfare of the two realms for ever ; and power was reserved to accept, reject, or modify any treaty which might be made ; and the commissioners were restrained from treating of and concerning any alteration of the worship, discipline, and government of the Church of Scotland as then by law established.

6. The English Parliament having passed an act in similar terms, commissioners were nominated by the Queen, and the labours of the joint-commissioners were brought to a successful and happy termination upon terms and conditions which have greatly contributed to the prosperity and happiness of both nations, and which have increased the power and stability of the empire.

321. *General idea of the preliminaries of the Union.*—Before I indicate the important clauses of the treaty of Union, allow me to make one or two remarks on the preliminary discussions. An equality of trade was the greatest difficulty which arose ; but was settled to the entire satisfaction of all parties by its being virtually conceded to Scotland in every respect, whether as regards shipping, or home or foreign trade. In order to put an end to the Darien Company, a sum was to be paid by England. About the two fundamental conditions of the Union, namely, the succession to the Crown and the union of the legislature of the two kingdoms, there was perfect unanimity. The representation in Parliament was also easily adjusted. The independence of the judicial administration in Scotland did not cause any dispute whatever. The

debts and revenue of each country were ratably apportioned, and the supreme internal administration of Scotland was clearly intended to be conducted, as before the Union, by a Council, whose duties, for the most part, have subsequently devolved upon the Lord Advocate of Scotland and the principal Secretary of State for the Home Department.

322. *Main provisions of the treaty of Union.*—The main clauses of the Act of Union are these :

1. The two kingdoms of Scotland and England shall be and for ever remain united into one kingdom by the name of Great Britain.

2. The succession to the monarchy of the United Kingdom, and of the dominions thereunto belonging, after Queen Anne, and in default of her issue, shall be, remain, and continue to the Electress and Dowager of Hanover, and the heirs of her body being Protestants; and papists, and persons marrying papists, shall be excluded from and for ever be incapable to inherit, possess, or enjoy the imperial crown of Great Britain and dominions annexed.

3. The United Kingdom shall be represented by one and the same Parliament.

4. The subjects of the United Kingdom shall have full freedom and intercourse of trade and navigation to and from any port or place within the said United Kingdom, and the dominions and plantations thereto belonging.

5. All ships or vessels belonging to Scotchmen are to be deemed British ships.

6. All parts of the United Kingdom shall have the same allowances, encouragements, and drawbacks, and

be under the same prohibitions, restrictions, and regulations of trade, and liable to the same customs on import and export.

7. The same weights and measures shall be used throughout the United Kingdom as are established in England.

8. The laws concerning the regulation of trade, customs, and such excises to which Scotland is, by the treaty, to be liable, shall be the same in Scotland, from and after the Union, as in England; and all other laws in use within this Kingdom, or after the Union in use within Scotland, shall remain in the same force as before, but alterable by the Parliament of Great Britain; with this difference between the laws concerning public right, policy, and civil government, and those which concern private right, that the laws which concern public right, policy, and civil government, may be made the same throughout the whole of the United Kingdom, but that no alteration shall be made in the laws which concern private right, except for the evident utility of the subjects within Scotland.

9. The Court of Session is to remain as established, and to be subject to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain. So with regard to the Justiciary and Admiralty Courts, and all other Courts. No English Court in Westminster Hall shall have power to cognosce, review, or alter the acts or sentences of the judicature within Scotland, or stop the execution of the same.

10. All heritable offices, superiorities, heritable jurisdictions, offices for life, and judicatures for life,

shall be reserved to the owners thereof as rights of property.

11. The rights and privileges of the Royal Burghs of Scotland shall remain.

12. Sixteen peers of Scotland shall be the representatives of Scotland in the House of Lords of Great Britain, and they shall be elected for each Parliament.

By a subsequent act, peers and the eldest sons of peers of Scotland were excluded from the British House of Commons. It was the rule of the Scottish Parliament before the Union to exclude the eldest sons of peers from the Parliament; but this precedent was not followed at the legislative Union between Great Britain and Ireland. Then in 1832, 2 and 3 William IV. c. 65. s. 37, it was enacted that the eldest sons of Scottish Peers might be elected Members of Parliament for Scotland.

13. The sixteen Scottish peers who are to sit in the House of Lords shall have all the privileges of peers of England; and all the peers of Scotland, and the successors to their honours and dignities, shall rank next after the peers of Great Britain in existence at the time of the Union; and, with the exception of sitting in the House of Lords, shall enjoy all the rights and privileges of English peers.

14. Forty-five Commoners shall be the representatives of Scotland in the House of Commons of the Parliament of Great Britain.

15. The Act, which was passed by the Scottish Estates, for securing the Protestant religion and the Presbyterian Church government is made a fundamental and essential condition of the Treaty in all time

coming. The words of that statute are that the Act itself, with the Establishment and settlement therein contained, shall remain, and be observed, in all time coming as a fundamental and essential condition of any Treaty of Union to be concluded betwixt the two kingdoms, without any alteration thereof, or derogation thereto, in any sort, for ever.

Such are the chief stipulations of the Treaty of Union between Scotland and England, as approved and sanctioned by the legislatures of both countries. The Queen, when she ratified the Act of Union, made use of these wise, weighty, and ever to be remembered words: "I consider this Union as a matter of the greatest importance to the wealth, strength, and safety of the whole island; and I make no doubt that it will be remembered and spoken of hereafter to the honour of those who have been instrumental in bringing it to such a happy conclusion." As the Queen and all the great statesmen of the age predicted, the greatest success has attended this important measure.

323. *Agitation for repeal of the Union.*—Soon after the Union, disturbances and riots arose; and, during the reign of Queen Anne, violent discussions took place in Parliament, and elsewhere, in regard to proposals made for the dissolution of the Union, and a motion for that object was lost in the House of Lords by a majority of but one vote. The feelings which then gave rise to this condition of matters have happily long disappeared, and such perfect amity exists between all classes of the two countries that the man who would now propose to

dissolve the Union between Scotland and England would be considered by all classes of the two countries as a madman, or a fool, or a public enemy.

324. *Conclusion.*—We have received a glorious inheritance from our ancestors; and the remembrance of the labours, the wars, the sacrifices which have been borne to secure our rights and liberties, our persons and estates, from all attacks whether at home or abroad, and to place them above the fancies and caprices of kings, ministers, or demagogues, ought, by every means in our power, to induce us to guard and defend the sacred gift, and hand down to future generations the laws and institutions which we have received from our forefathers not only unimpaired, but, if possible, with greater lustre than they possessed when they were entrusted to our care. We ought also to remember that a free, intelligent, industrious, and virtuous people are alone capable of retaining and enjoying the glorious privileges of a free government such as we possess. May we and our descendants ever be worthy of such a priceless gift. Finally, may the British Constitution, which has been highly and justly praised by the wise and the good both here and abroad, ever remain to the remotest ages of the world's history as a monument of the greatness of the British people, and as a pattern of a wise and beneficent government.

LECTURE VI.

FROM THE ACCESSION OF THE HOUSE OF HANOVER TO THE
PRESENT TIME (1714-1878).

FOURTH EPOCH.—BRITISH.

HISTORICAL SURVEY.

325. *Introductory*.—It has been supposed by some that the life of a nation, like that of an individual, can be divided into four great epochs: infancy, youth, adolescence, and old age. So far as there is any truth in this theory, I may say that, in my previous lectures, I have considered the infancy, the youth, and a portion of the full development of the constitutional and legal history of Scotland. Certain I am that we have not yet reached the last crisis of our national existence. Nor is it true that our laws and institutions have attained such a degree of perfection that no improvements can be made upon them, or that the national life will soon become stagnant for want of work. Nay rather, much has yet to be accomplished, by the abolition of unjust and inconvenient laws, in order to enable all the citizens to follow their own inclinations in so far

as not incompatible with the like freedom of others. Trusting that we may more clearly understand what are our legal rights and obligations, and how far the former are protected and the latter enforced, and how our laws and legal institutions have been improved in the last century and a half, let me bespeak your kind attention while I endeavour to lay before you the constitutional and legal changes which have taken place since the accession of the House of Hanover to the present time.

The epoch with which I have to deal is far too great to be disposed of this evening or in many evenings; but doing what I can, I propose to-night to treat of the legislative and judicial changes. In my next lecture I shall indicate the main alterations which have been made in regard to our local government, the Church, and the civil and criminal laws. With your permission I shall now refer to a few important events which appear to be intimately connected with the history of our legal institutions and our national progress.

326. *Privy Council abandoned, and British substituted.*—For a short time, the internal executive administration of Scotland was conducted by a Scottish Council, which was abandoned soon after the Union, and now Scotch affairs come under the cognisance of the British Cabinet, and are mainly conducted by the principal Secretary of State for the Home Department, the Secretary of War, and the heads of the various departments in London for the supervision of the imperial exchequer. Still, the Lord Advocate has considerable influence in the government of Scot-

land. Many, who have had large practical experience of the way in which Scotch business is managed in Parliament, think that an Under Secretary of State is needed for the proper conduct of the public affairs of Scotland.

327. *India made an integral part of the Empire.*—In India a mighty empire, with an immense population, of wonderful fertility, and stupendous extent, has been annexed to the British kingdom as an integral part of the empire. Our Indian empire was founded in 1599 by a company of English merchants. It afterwards became too great to be governed by a trading company. It was therefore placed under the sole control of the Queen's government, and is now ruled by Her Majesty as Empress of India. *Vide* 21 and 22 Vic. c. 106 (1858); 39 Vic. c. 10 (1876), and relative proclamation. She is assisted in the government of India by a Secretary and Council for Indian affairs in England, and by the Viceroy of India and his several Councils in India.

328. *United States of America declared independent.*—After war with our colonies in America had been carried on with varied success, the independence of the revolted provinces was recognised by the British legislature in 1783. This contest has shewn the folly of opposing the wishes of our colonists for freedom secured by local institutions; and has led the way to the large measure of freedom and independence which have since been conceded to our colonists in all parts of the world.

329. *Union between Great Britain and Ireland.*—The legislative Union between Great Britain and

Ireland was a memorable event, and took place in 1801. It was partly brought about by the Irish rebellion of 1798. Although Ireland is not yet content with her condition in the British Parliament, it is to be hoped that the spirit of fairness and justice which has recently been adopted by the British legislature towards the people of Ireland, and the strong desire of those who happen to live in England and Scotland to further all rational schemes for the national happiness and prosperity of Ireland, and for the abrogation of all unjust distinctions by which freedom is diminished, and of all injurious restrictions by which her agriculture and industries are hampered, will ultimately, and perhaps before long, bring about that feeling of common interest which is so indispensably necessary for all who are joined together in political union.

330. *Free trade adopted.*—Free trade has long been adopted as the guiding principle in all our fiscal and commercial arrangements, and has greatly contributed to the national welfare.

Formerly minute and stringent regulations were enforced as to the raw material imported into Scotland, and as to articles which were made in this country. Let me give you two instances: First, Thus, by 19 Geo. I. c. 26, after the 1st of November 1727, all imported lintseed and hempseed were to be fresh, good, and clean, and without mixture; the quality and size of yarn and cloth were fixed, and all cloth for sale had to be stamped by public officers. Second, In 1718, and for many years afterwards, rules were enforced as to the size of stockings, *e. g.* the length and breadth of the leg, heel, and foot are minutely specified

for the different sizes in use. These and all such restrictions have wisely been either repealed, or have fallen into desuetude.

331. *Colliers and salters released from servitude.*—Colliers and salters occupied an anomalous position in Scotland till the end of last century; for many of them were bound by a species of servitude depriving them of their liberty, and astringing them to the mines in which they worked. This disgraceful state of matters was ended by the combined effect of 15 Geo. III. c. 28 (1775) and 39 Geo. III. c. 56 (1799). By the latter statute, the legislature declared that all the colliers in Scotland, who were colliers at the time of the passing of the former act, should be and were thereby freed from their servitude, and should be in the same situation, in every respect, as if they had obtained a decree of freedom under the act of 1775. They were also placed under the laws as to unlawful combinations applicable to workmen. Afterwards, the Act of 39 and 40 Geo. III. c. 77 (1800) was passed for the security of colliers and miners, and for the better regulation of collieries and mines. Passing over several statutes subsequently made for carrying out these purposes, I come to 13 and 14 Vic. c. 100, and 19 and 20 Vic. c. 108, and have to say that miners are now placed under the supervision of an intelligent body of Government inspectors, whose duty is to see that they do not undergo any greater risks than the dangerous character of their employment necessarily involves.

332. *Slavery illegal.*—Till within the last forty years, every one knows that slavery in the British

plantations was recognised as a legal institution ; but some of you may be surprised to hear that it was not judicially settled, till about a century ago, that a negro slave in this country was absolutely entitled to his freedom. The right of a negro to his freedom in Scotland was raised in an action instituted before the Sheriff of Perthshire ; and, on appeal, was afterwards brought before the Court of Session. The decision of the Judges of the Supreme Court was given on the 16th of January 1778. It affirmed the interlocutor of the inferior court, and is to the following effect : “ Finds that the state of slavery is not recognised by the laws of this kingdom, and repels the defender’s (the master’s) claim to perpetual service.”

From the beginning of this century, the detestable trade in human beings in any part of the British empire was becoming more and more inconsistent with public sentiment. Slavery in our colonies was therefore finally abolished by the British legislature in 1834. Compensation was awarded to the slave owners out of the imperial exchequer.

333. *Many continental wars waged.*—During the last century and a half, we have had several extensive wars, and have spent enormous sums of money in quarrels which did not seriously involve the interests of the people of this country. Still, the glorious victories of Wellington are grand episodes in the history of the British Empire, and give us a good title to be recognised as the friends of oppressed nationalities, and as the then vindicators of eternal justice in opposition to the vaulting ambition of a military despot, whose subjects became filled with

the vain imagination of regenerating the world by means of war and bloodshed.

334. *Non-intervention the cardinal doctrine of our foreign policy.*—Finally, the principle of non-intervention—by which I understand not an absolute determination to have nothing to do with the affairs of neighbouring countries, but rather a recognition of the right of every sovereign power to manage its own internal affairs, and to establish any form of government whatever within its borders—having been almost unanimously accepted by all parties in the state as the general rule of our foreign policy, it is to be hoped that, while other independent states are allowed to pursue their own notions of liberty and prosperity as may seem best to them, we shall always be ready to give our moral, if not material, support to those who possess institutions kindred to our own, or even if they are only striving to get them. We must also be always prepared to protect and defend our vast possessions, and never grudge any sacrifice required for the defence of our laws and institutions, and the maintenance of the integrity of the whole Empire. In all things, whether at home or abroad, let our national policy be wise, just, equitable; let all of us subordinate our own personal inclinations to the welfare of the nation; and our country will be great, prosperous, and happy.

THE ROYAL PREROGATIVES.

335. *Accession of the House of Hanover.*—George I. descended from James I. of England and VI. of

Scotland, was the son of the deceased Dowager Duchess Sophia of Hanover. He was the nearest living Protestant heir of this kingdom. The accession of the House of Hanover to the British throne caused two serious rebellions in Scotland. The defeat of the rebels at Sheriffmuir in 1715 and at Culloden in 1745 completely overthrew the supporters of the Stuarts. Although the cruelties inflicted on the vanquished were severe, even atrocious, time has softened the memory of all that was then endured, and now the descendants of the House of Hanover are universally recognised by all as best entitled to the British crown.

336. *Changes in the Sovereign's political rights and duties.*—The substitution of the House of Hanover for the nearest lineal heirs of the Stuarts did not alter the rights and duties of the British Sovereign. But the evolution of a greater democratic spirit in the nation, and a more efficient control of public affairs by the Houses of Parliament, have effected vital changes upon the royal prerogatives since the Hanoverian succession. Still, although by the progress of recent events one might suppose that the Sovereign's authority has been reduced to impotence, and that the Queen has lost, or rather never had, some of the direct political power which some of her predecessors held, she can and does exercise very great influence on public affairs.

In lieu of the Crown properties handed over to the nation, Her Majesty has a fixed income settled on her for life.

337. *The Sovereign's veto as to Parliamentary bills.*—Formerly, the Sovereign often refused to sanction the bills passed by both Houses of Parliament. Now, the exercise of the Sovereign's veto is never heard of, and no minister of the crown would dream of restoring it. This state of matters proves the great legislative power which has been acquired by the Peers and the Commons. The government of the country has been popularised, and the ultimate tribunal to which all great national questions must be brought is that of the people, without whose approbation no ministry can remain in power for any length of time.

338. *The demise of the Sovereign.*—In 1797, a statute as to the meeting of Parliament on the demise of a Sovereign when no Parliament was in existence was repealed; and it was enacted that, in the foresaid event, the last preceding Parliament was to be convened, and to sit for six months, unless sooner prorogued or dissolved by the Sovereign: 37 Geo. III. c. 127.

PARLIAMENT.

339. *The Peerage of the United Kingdom largely increased.*—In the constitution of the House of Lords, no vital change was made during the present epoch. No doubt, numerous peerages were created, and perhaps at least one-half of the existing Peers of the House are descended from those who have been ennobled since the accession of the House of Hanover, but, with the exception of a limitation of its judicial powers as a Court of Appeal, its hereditary rights

and privileges remain as they were at the end of the last epoch.

340. *Irish elective Peers added at the Union.*—Of course, in 1801, at the Union between Great Britain and Ireland, the British House of Peers was augmented by the representatives of the Irish Peers. Then twenty-eight temporal and four spiritual Peers were added to the British House of Lords. The Irish representative Peers are chosen for life. In this respect they differ from the Scotch representative Peers, who are chosen for each Parliament. As all know, the Irish Episcopal Church, on being disestablished and disendowed in 1869, was deprived of its ancient privilege of sending representatives to the House of Lords.

341. *Privileges of Scotch Peers as to capital offences.*—By 6 George IV. c. 66 (1825), regulations were made as to the trial of Scotch Peers in certain cases. Thus, all treasons, misprisions of treason, murders, and all other crimes involving capital punishment, when committed by Scotch Peers or Peeresses are to be inquired into by a commission under 6 Anne, c. 23; and, when indictments are found to be true, the parties charged are to be remitted to Parliament. Further, all other crimes charged against members of the Scotch Peerage are to be tried by the Court of Justiciary, or other court having jurisdiction over the offence.

342. *Disqualification of bankrupt Peers.*—An important statute was passed in 1871, by which bankrupts are disqualified from sitting or voting in the House of Lords, or any committee thereof. Further, Peers of Scotland or Ireland shall not be

capable of being elected to sit and vote in that House. On the determination of a Peer's bankruptcy, his privileges are restored ; but any bankrupt who sits or votes in the House of Lords is guilty of a breach of the privileges of the House, and may be dealt with as the House directs : 34 and 35 Vic. c. 50.

343. *Additional parliamentary representatives given to Scotland.*—By the Reform Act of 1832, eight additional representatives were given to Scotland, and all of them to the Royal Burghs : 2 and 3 William IV. c. 65. Again, under the Act of 1868, Scotland received an increase of seven members in the House of Commons. Of these the Universities received 2, the City of Glasgow 1, the Town of Dundee 1, and the Counties of Lanark, Ayr, and Aberdeen 1 each : 31 and 32 Vic. c. 48.

344. *Incapacities as to sitting in the House of Commons.*—In consequence of our previous discussions, it may be remembered that, according to the ancient customs of the Scottish Parliament, there was nothing to prevent the Judges of the Supreme Court from being representatives of a burgh or county, or discharging all the duties of an ordinary representative; that, even when they were neither Peers nor were commissioners by election, they had, *ex officiis*, seats in the House; and that although they could not vote, yet they had a right to speak on subjects discussed before the House. No change on this subject was made by the Articles of the Union ; and as the Peers and the Commons occupied separate chambers in the English Parliament, the popular branch of the Scottish legislature joined the English House of Commons, and

the elective Peers of Scotland took their seats in the House of Lords. The question then arose as to what were the Parliamentary rights and privileges of the Supreme Judges of Scotland in the British Parliament. By the ancient, invariable practice of England, none of its Supreme Judges, with one exception, namely, the Master of the Rolls, had ever officially sat and also voted in the English Parliament. True, all of them were entitled to seats on the woolsack, and were liable to be called by the Peers for counsel and advice, yet none of them ever had the peculiar privileges which belonged to the Judges of the Supreme Courts of Scotland. This was, therefore, clearly one of those cases in which the English practice, by the force of circumstances, was certain to be adopted. Accordingly, in 1734 (5 Geo. II. c. 16), it was enacted that the Judges of the Court of Session and the Court of Justiciary and the Barons of the Court of Exchequer in Scotland should be incapable of election, or of sitting or voting, as members of the House of Commons: 5 Geo. II. c. 16. This enactment left the Supreme Judges of Scotland in much the same position as the English. As a matter of fact, the Judges of the Court of Session have rarely been asked to assist the British House of Peers with counsel or advice. Further, their privilege even to a seat in that venerable assembly is more circumscribed than that of their English brethren; and the recent judicial changes in the constitution of the House of Lords will render the possibility of the Scottish Judges ever appearing again in the British House of Peers most improbable.

In passing I may here observe, that, although there are no small advantages in having the Supreme Judges set apart from the turmoil and excitement of a popular assembly, there is nothing to support this practice except a mere accident, followed by inveterate use. That there was no disadvantage in the Master of the Rolls formerly sitting in the House of Commons, rather considerable advantages in many respects, I am much inclined to believe. Even now there is nothing to hinder the inferior Judges of Scotland from sitting in the House of Commons; and it has never been thought objectionable to have several of the Supreme Judges of England, Scotland, and Ireland sitting in the House of Lords as hereditary Peers.

345. *Disqualifications as to members, and repeals thereof.*—By 30 Geo. III. c. 10. (1790), the Speaker of the House of Commons was disabled from holding any office or place of profit during the pleasure of the Sovereign.

In the sixth of Queen Anne, c. 7. s. 25, 26, and 27, a law had been passed that no person who had a pension for years from the Crown should be capable of being elected, or of sitting or voting as a member of the House of Commons; that the acceptance of a Crown office of profit made an election to the House of Commons void, and rendered re-election necessary; and that officers of the army and navy were exempt from the last-mentioned rule. To render this statute more effectual, it was enacted, in 1715, that, if any person who had a royal pension should sit, he was to be fined £20 a day: 1 Geo. I. st. 2. c. 56. A few years later (1742), more sweeping exclusions were

made on the supposition that the King's service and popular interests were irreconcilable. Consequently the Lord High Treasurer, the Chancellor of the Exchequer, all the principal Secretaries of State, and the various officers of the revenue and otherwise connected with the King's service, were excluded from the House of Commons : 15 Geo. II. c. 22.

Most of these regulations have been repealed, and the general rule since 1801 has been that, where an appointment to any place of profit, held immediately from the Crown, is given to a member of the House of Commons, his seat becomes vacant ; and, if not otherwise incapacitated, the new official may be re-elected by his former or any other constituency : 41 Geo. III. c. 52. Still further, by the Reform Act of 1868, the necessity for re-election on the appointment of a member of the House of Commons to most of the executive and legal appointments under government has been abrogated.

346. *Prevention of bribery and corruption.*—During the epoch under consideration, several statutes were passed to prevent bribery and corruption in the election of Members of the Lower House of Parliament. One prominent feature of recent legislation on this head is, that all election expenses must be paid through an authorised agent of the candidate.

Various consequences and disabilities arise in the event of corrupt practices being used. In particular, a candidate who is guilty of bribery is incapable of sitting in the House of Commons for seven years thereafter ; and, when a candidate knowingly employs a corrupt parliamentary agent, his election is void.

347. *Returns as to members, and committees for contested elections.*—By 10 Geo. III. c. 16 (1770), a statute was passed to regulate elections or returns of members to serve in Parliament. It is known as Grenville's Act, and created a revolution in the mode of trying contested Parliamentary elections. The main object of this Act was to reduce the trial of Parliamentary returns to the forms of a regular trial at law. This was accomplished by drawing forty-nine names of members from boxes or glasses, reducing the number to thirteen, who, with the nominees of the committee, were to be sworn to give a true verdict according to the evidence, and report their resolutions to the House. This Act, which was temporary at first, was made perpetual by 14 Geo. III. c. 15, and removed the injustice and uncertainty of the previous decisions of the whole House, and gave unqualified satisfaction till the decision of these matters was remitted to the judges of the Supreme Court.

348. *Contested Parliamentary elections in Scotland determined by the Court of Session.*—In 1868, the jurisdiction as to Parliamentary elections was surrendered by the House of Commons to the Supreme Courts of law, *i.e.* in Scotland to the Court of Session, and the trial was to be in presence of a puisne judge. At the conclusion of the trial (section 11), the judge shall determine whether the member whose return or election is complained of, or any or what other person, was duly returned or elected, or whether the election was void; and shall forthwith certify, in writing, such determination to the Speaker of the House of Commons. Upon a certificate to this effect being given, such

determination shall be final to all intents and purposes ; and, when there is a charge of corruption, the judge shall report thereof to the Speaker : 31 and 32 Vic. c. 125. A statute was also passed in the following year by which the Lords of the Treasury were empowered to pay the expense of election commissioners appointed to inquire into corrupt practices in Parliamentary elections, and to obtain repayment from the county or burgh in which the inquiry is made : 32 and 33 Vic. c. 21.

349. *The progress of popular representation.*—A usage, contrary to the customs of the realm, having sprung up in Sutherlandshire, it was declared that, after the 1st of September, 1745, no person should be capable of being elected a commissioner for the said shire, or should have a vote at any election therein, unless he was infeft or was in possession of lands liable to his Majesty's supplies and other public burdens at the rate of £200 Scots valued rent. Further, that candidates and electors, unless where the superior was a peer or a corporation, must hold their lands immediately of the king or prince : s. 19 and 20. Further, that when there was a meeting for the election of commissioners, and also of peers, and there happened to be an equality of votes, the president should have a casting vote : s. 28. 16 Geo. II. c. 11.

All magistrates, town councillors, or other persons claiming a right to vote for a member of Parliament for burgesses should swear that they had not received any money or place, or any consideration or promise thereof, for their votes. The pains of perjury were attached to the breaking of this oath : Ibid. s. 34 and 39.

All wrongs as to elections were declared to be capable of redress by the Court of Session : *Ibid.* s. 24.

350. *Great changes made in 1832.*—I may remind you that, up till 1832, the commissioners for the counties were elected by the freeholders, and the representatives of the burghs by the town councils of the royal burghs, and that the latter were self-elected bodies. You will, therefore, at once perceive that a great change must have been effected by the Reform Bill of 1832. For a long time, the reform of the representative system of Parliament had been advocated by the most enlightened politicians of their age. But the terrible and calamitous results of the first French Revolution had frightened moderate men from undertaking this necessary work. It was not till disorder and popular clamour assumed alarming proportions that the reform was successfully carried through by the Whigs.

Two vital alterations were made by this Act, namely, representation was conferred on certain tenants in the county, and the right of voting was no longer to be exercised in burghs by the town councillors and their delegates, but by those who owned or occupied premises of the yearly value of £10.

351. *The provisions of 2 and 3 Wm. IV. c. 65 (1832).*—The qualifications of county voters were, that they should have £10 clear yearly from land as owners, or be tenants of lands, houses, or other heritable subjects under a written title for fifty-seven years, or the life of a tenant, of the clear yearly value of £10, or of £50 for nineteen years, or personal possession of heritage yielding a rent of £50 : s. 7 and 9.

The qualification in burghs was occupation for twelve months as proprietor, tenant, or life-renter of a house, &c., or land, of the same landlord, of £10 yearly, provided the assessed taxes were paid, and the residence of the voter was within the burgh or within seven miles thereof, and that the elector had not been a pauper within twelve months : s. 11.

The powers, duties, and functions vested in the freeholders of the county as to making up a yearly roll of the county electors, and, subject to an appeal to the Court of Session, acting as constituent members for revising the same, were transferred and vested in the Sheriffs of counties, and all their other powers, duties, and functions were transferred and vested in the commissioners of supply : s. 14 and 45. Thus the ancient county court came to an end. The Sheriffs decide on the claims of voters for the burghs as well as the counties.

352. *Agitation for further reform.*—Very soon after the passing of the Reform Act of 1832, agitations were raised for a still greater extension of the franchise, in order to give the great body of the people more control over the affairs of the nation. The frequent and rapid changes of opinion, and the remarkable vacillation of both parties in the state, will be in the recollection of all here present, and need not be recalled. Suffice it to say that, after several failures, the representation of the people was amended, and an Act, applicable to Scotland, was passed in 1868.

353. *Provisions of the 31 and 32 Vic. c. 48 (1868).*—The county franchise in Scotland has been greatly extended under this Act. 1. As to owners : Every

man of full age, and not legally incapacitated, who was and is owner for six months previous to the last day of July of lands and heritages of £5 or upwards, after deduction of feu-duty, ground annual, or other annual consideration, is entitled to vote for the county representative in Parliament. 2. As to occupiers: Subject to the same exception as to age and legal capacity, every occupier who is and has been a year preceding the last July in the actual personal occupation as tenant of land and heritages within the county of £14 as appearing on the Valuation Roll, and who must not be exempted from the payment of poor rates from inability to pay the same, nor have failed to pay these rates by the 20th of June, nor have been in the receipt of parochial relief for the previous year, is entitled to vote in the county for the representative in the High Court of Parliament : s. 5 and 6.

The burgh franchise was also very much lowered. Thus, every man qualified as follows is entitled to be registered as a voter for a burgh representative in Parliament : 1. He is to be twenty-one years of age, and not subject to any legal incapacity, that is, he must neither be confined as a lunatic nor be undergoing imprisonment. 2. For a year preceding the last day of July, he must be an inhabitant occupier as owner or tenant of a dwelling-house within a burgh, and must not be subject to any of the above causes for exemption as to payment of poor rates or being on the poor's roll : s. 3.

By this Act of 1868, an entirely new franchise was created. This is the burgh lodger franchise, and its qualifications are full age, not being subject to any

legal incapacity, and the occupation of unfurnished lodgings of the value of £10, and residence therein for twelve months : s. 4.

There are sundry other regulations to which I might refer. For example:—1. An appeal may be taken to the Court of Session from the decision of the sheriffs, as to those who claim to be enrolled as voters. 2. The registers, which are yearly made up, are made conclusive evidence of the right to vote. 3. The payment of money for conveying burgh voters, but not county voters, to the poll is illegal.

Here I also may notice that the disqualification imposed, by an Act of 22 Geo. III., on certain officers of the revenue from voting, was repealed in 1868 : 31 and 32 Vic. c. 73.

354. *Observations on the Reform Acts.*—That these Reform Acts have been productive of much good, and that their further extension would develop the free institutions of our country, I firmly believe. I shall therefore rejoice when all the citizens, whether in town or country, shall be put on a footing of equality. At the same time, it must be remembered that the leaders of public opinion in a free country such as this, which is most susceptible to the slightest touches of popular feeling, and which has great national and vital interests in the peace and prosperity of all the world, are bound to consider how far an extension of the franchise would contribute to the national welfare, and would not increase the dangers which arise from ignorant masses being made subservient to despotic power. I would also take leave to observe that, after all, liberty in a real and practical sense, *i.e.* of a full

and equal right to freedom, is of much greater consequence to the people at large than the most perfect system of representation that can be devised. In other words, good laws are of infinitely greater importance to national and individual welfare than the most perfect electoral machinery, when real freedom does not exist. Further, although I admit that there is the greatest advantage in a free state having all its citizens represented in the national assembly, and that the rights of citizenship should as nearly as possible coincide with its duties, I protest against a mistaken notion, which has often been prevalent, that reforms in the representative system will greatly enhance the happiness and prosperity of the people. Virtue and industry alone are the chief elements of national greatness in the highest and best sense.

Having said thus much on the general question of voting, upon which I would require a much longer time than I now have in order to elaborate my views as the subject deserves, I proceed to notice the Ballot Act of 1872.

355. *The provisions of 35 and 36 Vic. c. 33 (1872).*—This statute is applicable to parliamentary and municipal elections, and remains in force till 1880, when it will undoubtedly be made perpetual; for it has been found to be a most innocent measure, and, although inadequate to put an end to bribery and corruption or even intimidation, is well adapted for the necessities of the modern polling booth. There are only three provisions to which I need here refer: 1. The nomination of a candidate for the House of Commons is to be in writing, and the absurd farce of

an election by a show of hands is abolished. 2. In the event of a poll being demanded, or necessary, the votes shall be given by ballot, and ballot papers are to be given to each voter. 3. Personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation is declared to be felony, and punishable by two years' imprisonment, with hard labour. Where bribery, treating, or undue influence has been used, the vote is to be struck off.

THE ADMINISTRATION OF JUSTICE.

356. *Heritable jurisdictions opposed to the national welfare.*—The feudal or hereditary jurisdictions had long been considered a great national grievance. As owners of the soil, and possessed of extensive civil and criminal rights, the landlords had a tenantry devoted to their service. The consequence of this was, that the great barons, and especially the northern chiefs, easily made the inclinations of the bulk of the people subservient to their wishes, which were frequently opposed to the interests of the nation as a whole. This state of things became intolerable in the beginning of last century, and the attempts which were then made to subvert the Hanoverian succession led to the evil being entirely uprooted. Beyond all doubt, the insurrection of 1715 can be traced to the chagrin and disappointment

of the Earl of Mar rather than national predilections ; and, in addition to this, the quarrels and feuds of the Highland chiefs with each other caused serious disturbances of the peace.

357. *These jurisdictions abolished, and vested in the King's Courts.*—In 1747, it was enacted that all heritable jurisdictions in Scotland should be abolished, and vested in the King's Courts, *i.e.* in the Courts of Session and Justiciary, and of the sheriffs, stewards, and other judges, as if such heritable jurisdictions had never existed.

Provisions of 20 Geo. II. c. 43 (1747).—The words of the Act are, “That all heritable jurisdictions of justiciary, and all regalities and heritable baileries, and all heritable constabularies other than of the office of the High Constable, and all other stewartries, being parts only of shires or counties within that part of Great Britain called Scotland, belonging unto or possessed or claimed by any subject or subjects, and all jurisdictions, powers, authorities, and privileges thereunto appurtenant, or annexed or dependent thereupon, shall be and are hereby, from and after the 25th day of March 1748, abrogated, taken away, and totally dissolved and extinguished.”

Numerous grants had been made in favour of heritors “*cum fossa et furca*,” or with power of pit and gallows as it was called, by which capital punishment could have been inflicted. This right had almost fallen into disuse, and was now totally abrogated, and the judicial powers of all heritors were restricted to minor offences and small debts, unless the actions were against their own tenants : s. 17. The jurisdic-

tions of the royal burghs were reserved; and the appointment of the sheriffs-principal were ultimately to be made *ad vitam aut culpam*: s. 26 and 29.

An appeal was given in all criminal causes, and, after final judgment, in civil cases where the amounts involved did not exceed £12, from the inferior judges to the Court of Justiciary: s. 34.

Sentence-money to the sheriff, steward, sheriff-depute, or steward-depute, or any of their ministers, officers or clerks, was abolished: s. 43.

358. *The House of Lords: The provisions of the Appellate Act of 1876.*—The statute of 1876, 39 and 40 Vic. c. 59, for amending the law in respect of the appellate jurisdiction of the House of Lords, is in accordance with the principles which I indicated in 1875: *Vide* p. 146. It came into operation on the 1st of November 1876.

Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in Her Court of Parliament: s. 4.

There must be three of the following Lords of appeals at every hearing: The Lord Chancellor of Great Britain; the Lords of Appeal in Ordinary mentioned in the Act; and such peers as have held or are holding certain high judicial offices: s. 5.

Two qualified persons are to be appointed by letters patent as Lords of Appeal in ordinary; and every Lord of Appeal in ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown,

but he may be removed from such office on the address of both Houses of Parliament. Every Lord of Appeal in ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall be entitled during his life to rank as a Baron by such style as Her Majesty shall be pleased to appoint, and shall, during the time he continues in his office as a Lord of Appeal in ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords. His dignity as a Lord of Parliament shall not descend to his heirs : s. 6.

The House of Lords may sit and vote, to hear and determine appeals during any prorogation of Parliament, at such time and in such manner as the House of Lords may appoint : s. 8.

The subject matter, costs, time, practice, and procedure may be regulated by orders of the House of Lords : s. 11.

359. *The Court of Session: The provisions of 48 Geo. III. c. 151 (1808).* — Till the passing of this Act, all the judges constituted one court. It was now broken up into two chambers or divisions, which were to have co-ordinate jurisdiction in all cases. The First Division, or Inner House, was to be composed of the President of the Court of Session and seven ordinary Lords; and the Second Division, or Outer House, of the Lord Justice-Clerk as president and six ordinary Judges.

An appeal was to be inadmissible to the House of Lords from an interlocutory judgment, and was to be allowed only when the judgment or decree was

on the whole merits, except with the leave of the Division, or when there was a difference of opinion amongst the Judges.

A commission was also to be appointed to inquire into the administration of justice, and consider how far it was desirable to introduce trial by jury into the Court of Session.

360. *The Civil Jury Court : Jury trials introduced by 55 Geo. III. c. 42 (1815).*—In 1815 trial by jury was introduced in civil causes before the Court of Session by the establishment of a separate Court, which was attached to the Supreme Court. At first either Division might direct the Jury Court to try any matters of fact in the actions before it.

361. *The provisions of 59 Geo. III. c. 35 (1819).*—All ordinary actions for damages were to be remitted by the Lord Ordinary to the jury court to settle the issues, and try the same : s. 1.

Where a new trial was essential to the ends of justice, it was to be granted by a divisional court : s. 6.

When the verdict was unquestioned, it was final : s. 8.

The jury was to be composed of twelve persons as in England, and the chancellor or foreman was to have a double vote when there was an equality of votes : s. 21 and 33 ; and all verdicts were to be given by the whole number agreeing to a verdict.

362. *The statute of 1830 (11 Geo. IV. and 1 Wm. IV. c. 69) vested the jurisdiction of the Jury Court in the Court of Session.*—This statute abolished the Jury

Court which was attached to the Court of Session; and the jurisdiction for the trial by jury in civil cases was united with, and was thereafter to form part of, the ordinary administration of justice in the Court of Session.

363. *The modern jury trial never popular, and in 1850 the Lord Ordinary was allowed to try the facts.*—The modern trial by jury in civil causes has never taken deep root or been popular in Scotland, and it was therefore considered desirable to give litigants in the Court of Session the option of having facts ascertained by a judge without a jury. Accordingly in 1850 a Lord Ordinary was authorised to try the facts, and, unless his decision was reclaimed against, give final judgment: 13 and 14 Vic. c. 36.

364. *Unanimity abandoned.*—In all jury trials in England unanimity in the verdict is necessary, and a similar rule was adopted in Scotland in all civil jury actions. The supposition that twelve Scotchmen, taken by lot, should be of one mind in a jury trial was really too much to be taken for granted, and the notion had to be abandoned.

The statute of 17 and 18 Vic. c. 59 (1854) enacted that if, after six hours, nine or more of the jury were agreed, their verdict was to be taken as that of the whole number. This Act of 1854 was subsequently amended by allowing the verdict of nine to be taken after three hours, and by authorising the court, or a judge, to discharge the jury after a detention of six hours without their agreeing to a verdict. Another amendment was made in 1868 by which the verdict of the majority was allowed to be taken after the

jury had been enclosed for three hours in considering their verdict : 31 and 32 Vic. c. 100.

365. *The Circuit Judges may try civil jury actions.*—Under an Act of 1868, for the purpose of amending the procedure of the Court of Session, a practice, which had long prevailed in England and had been found to work well, has been attempted to be introduced into the judicial system of this country. I mean the trial of civil causes before a judge of the Court of Session and a jury at any circuit town in any period of vacation or recess. Where no special diet has been fixed for such trial, it is lawful for either of the judges presiding at the sitting of the Circuit Court of Justiciary to try the same in such circuit town : 31 and 32 Vic. c. 100.

366. *Appeals to the Court of Session.*—In order to diminish the expense of appeals from inferior judges to the Court of Session, several acts of Parliament have been passed in recent times.

The provisions of 1 and 2 Vic. c. 86 (1838).—This Act dispenses with the necessity of bringing bills of advocacy or suspension in the bill chamber, and of taking out letters of advocacy thereupon. It also declares that final and interlocutory judgments and decrees in absence, which might have been reviewed by the Court of Session before its passing, may be reviewed under a simple note of suspension.

The provisions of 13 and 14 Vic. c. 36 (1850).—Afterwards, in 1850, leave was given to litigants in advocations and suspensions, when the record was closed and the proof concluded in the inferior court, to bring their cases at once to the Inner House without a judgment of a Lord Ordinary : s. 32.

367. *The probable effect of lessening the expense of appeals to the Court of Session.*—The tendency of these Acts ^{is} are plain; and, beyond all doubt, will most probably lead to the total abolition of the office of the Sheriff-principal; and when one considers the combinations and unions effected during the reign of Her present Majesty (namely, by 16 and 17 Vic. c. 92, and 33 and 34 Vic. c. 86), and the various forces which have brought about these unions, I venture to think that as soon as all restrictions upon the country solicitors of Scotland have been removed, *e. g.* as to their practising before the Supreme Court, the Sheriffs-principal will not long afterwards exist. There are no corresponding judicial officers in England, and the appeal from an English county court judge, who occupies a somewhat similar position as a sheriff-substitute in Scotland, is directly to the judges of the Supreme Court. There is no reason why, in this matter, there should be any difference in the two countries.

368. *Notes of suspension substituted for advocations:* 31 and 32 Vic. c. 100 (1868).—In 1868, still greater simplicity was introduced in the mode of reviewing the decisions of inferior judges; for advocations were abolished, and simple notes of appeal, within six months after final judgments, were substituted in their stead.

369. *Judgments of Supreme Court may be executed in the United Kingdom.*—To render judgments and decrees obtained in certain courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom, an act was passed in 1868: 31 and 32 Vic. c. 54. This statute applies merely to

judgments of the superior courts; but there is no reason why a judgment of any competent tribunal of the United Kingdom should not, without further proceedings, be enforced in any part of the realm. However, so long as the judgments of an inferior court cannot be enforced out of its own limited territories, some time will yet require to elapse before this imperial, yet very reasonable, alteration is likely to be made.

370. *Reduction of the judicial establishment in Scotland.*—By 11 Geo. IV. and 1 Wm. IV. c. 69 (1830), various reductions were made in the judicial establishment of Scotland, and of these the most important were as follows: The office of Lord Justice-General, who was the President of the Court of Justiciary, was to be united with the office of the Lord President of the Court of Session, and the Lords Ordinary were to be reduced to five in number, and the total number of Judges of the Court of Session was fixed at thirteen.

371. *The Admiralty Court abolished.*—In 1830, the Admiralty Court was abolished by the last-mentioned Act, and its jurisdiction vested in the Court of Session; and admiralty causes, when the amount claimed did not exceed £25, were relegated to the sheriffs, who were also to have the same jurisdiction within their own sheriffdoms as the local courts of admiralty had before the passing of this act.

372. *Consistorial actions to be instituted in the Court of Session.*—The jurisdiction of the commissary of Edinburgh was also restricted by the said Act of 1830, and all consistorial actions were in future to be instituted in the Court of Session. Consistorial

actions are declarations of marriage and nullity of marriage, declarations of legitimacy and bastardy, and divorce or separation a mensâ et thoro.

373. *The Court of Justiciary: The provisions of 23 Geo. III. c. 45 (1783).*—This statute made it lawful to try capital crimes by an assize or jury in the same way as had been allowed in lesser crimes, without the evidence being taken down in writing (*vide* 21 Geo. II. c. 19). It also made it lawful for counsel on both sides, and also for the prisoner or panel, to interrogate the witnesses on all pertinent and legal questions, and imposed on the judge the duty of summing up the evidence to the jury.

This statute was temporary at first, and was made perpetual in 1787: 27 Geo. III. c. 18.

374. *Viva voce verdicts in presence of Court and panel: 54 Geo. III. c. 67 (1814).*—In 1814, *viva voce* verdicts were allowed to be taken in the High Court and Circuit Court of Justiciary when the jurymen were agreed. The chancellor of the jury was ordered to give the verdict in the presence of the court and panel.

375. *Witnesses obliged to attend criminal trials.*—In order to make the execution of the criminal laws of the kingdom more effectual, it was enacted that, where a sub poenâ, or other process, was served in a criminal proceeding, the witness must appear in any part of the United Kingdom; and that, on default, the court, to which notice of the default is brought, may proceed, where sufficient money for all expenses has been tendered, as if the witness had been summoned before itself: 45 Geo. III. c. 92. Further, by 54 Geo. III. c. 186, letters of second diligence, issued in Scot-

land, for compelling the attendance of witnesses residing in England, Wales, or Ireland to criminal trials in Scotland, shall be indorsable in the courts of Westminster, and certain other courts, and which shall authorise the bearer to apprehend the witnesses therein, and convey them to Scotland without any tender of expenses.

By another statute, the warrant of any Scottish judge for the citation of a witness is made to run over all Scotland.

376. *The functions of judge and jury in libels.*—Violent disputes having arisen, on the one hand, out of the claim which had been made by the judges to restrict the jury to the finding of the truth or falsehood of the special matters stated in the indictment; and, on the other, out of the claim by the jury to give a verdict on the whole matter before them, thus giving a general verdict of guilty or not guilty, they were set at rest by 32 Geo. III. c. 60 (1792). By this statute, the law is declared to be that “on every such trial, the jury sworn to try the issue may give a general verdict of guilty, or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty merely, on the proof, of the publication by such defendant or defendants of the passages charged to be a libel, and of the sense ascribed to the same in such indictment or information.”

There is nothing in this Act to prevent the judge, according to his discretion, from giving his opinion on

the matter in issue, or to hinder the jury from returning a special verdict. The statute has justly been considered a great protection against the tyranny and oppression of Government prosecutions.

377. *Civil jurisdiction raised to £25*: 54 Geo. III. c. 69 (1814).—As to the civil jurisdiction of the Court of Justiciary by way of appeal, I have to say that the amount was raised from £12 to £25.

378. *The erection of the Court of Exchequer*.—A new court was established after the Union in connection with the King's revenue: *Vide* 6 Anne c. 26, 1708, and subsequent statutes. This court was called the Court of Exchequer. After undergoing several modifications, it was at last abolished, and its whole jurisdiction vested in the Court of Session.

379. *Its jurisdiction and judges*.—It ranked as a supreme court, and its judges consisted of the Lord High Treasurer of Great Britain, a chief Baron, and four inferior or puisne Barons. It had exclusive jurisdiction as to the customs and excise and other revenues of the King or Prince of Scotland, and as to all honours and estates, forfeitures and penalties, due to the crown.

380. *Limitations to its authority*.—These were two: First, No crown debt affected the debtor's real estate otherwise than, and to the same extent, as a private debt; and, second, the validity of the title of the Crown to honours, lands, and casualties was decided by the Court of Session just as before the erection of the Court of Exchequer.

381. *Its jurisdiction vested in a judge of the Court*

of Session.—The abolition of this court was resolved upon, and, after undergoing various changes, the duties of the court were entrusted to a judge of the Court of Session: 1 Vic. c. 65 (1837). Before this, in 1833, the collection and management of the assessed and land taxes were transferred to the commissioners for the affairs of taxes, and they are presided over by the Commissioners of the Treasury: 3 and 4 Wm. IV. c. 13.

382. *Its jurisdiction vested in the Court of Session, and costs given as in ordinary actions.*—In 1856, the practice and procedure of the Exchequer Court were found inconvenient, and its whole power, authority, and jurisdiction were transferred to, and vested in the Court of Session. Further, the Crown was to sue and be sued in the name of the Lord Advocate of Scotland, and costs might be given for or against the Crown as in ordinary civil actions: 19 and 20 Vic. c. 56.

383. *Result of investigations as to the Supreme Court.*—Thus, in Scotland, there are only two supreme courts: first, the Court of Session for civil actions; and, second, the Court of Justiciary for criminal cases. Of these two courts, all the Judges of Justiciary are Judges of the Court of Session; but not *vice versa*.

384. *Modern changes in the administration of justice.*—Two great changes are, at present, taking place in the administration of justice in this country: first, all civil actions, including questions as to real rights, are being gradually brought under the cognisance of the Sheriff Court; and, second, greater simplicity and more summary procedures are being introduced.

385. *Sheriff Court: Extension of civil jurisdiction.*

—In 1838 the jurisdiction of the Sheriffs was extended “to questions of nuisance arising from alleged undue exercise of rights of property, and also to questions touching either the constitution or exercise of real or praedial servitudes.”

Before long, as I said in 1875, the Sheriff’s jurisdiction might well be considerably enlarged as to real rights. I now state in 1878 that it ought to be even still more extended.

An Act for the further extension of the jurisdiction of the Sheriffs was made by 40 and 41 Vic. c. 5 (1877). Section 8 declares that the Sheriffs and their substitutes shall have jurisdiction thus: first, in all actions—excluding certain actions of declarator and all actions of reduction—relating to a question of heritable right or title where the value of the subject in dispute does not exceed £50 by the year or £1000 in value; second, in all actions of declarator to determine any question as to the property in, or right of succession to movables, where the value in dispute does not exceed £1000; third, in all actions of division of commonalty and division, or division and sale of common property, where the value of the subject in dispute does not exceed £50 by the year or £1000 in value; and, fourth, in any action against a foreigner, provided (1) such action would be competent in a Sheriff Court against a Scotchman; and (2) a ship, or other vessel, belonging to such foreigner, or of which he is part owner or master, shall have been arrested in the Sheriffdom.

386. *Extension of criminal jurisdiction: Game.*—The Justices of the Peace once had exclusive jurisdiction and

also cumulative jurisdiction with the Sheriffs as to the prosecutions of offenders against the Game Laws. By 40 and 41 Vic. c. 28 (1877), they were deprived of this jurisdiction, and the Sheriffs are now the exclusive judges of those who are charged with offences against the Game Laws.

387. *Improvements on procedure.*—By 16 and 17 Vic. c. 80 (1853), the procedure before the Sheriff in civil and criminal causes was greatly improved, and the main provisions of the present practice laid down. Thus, written arguments were abolished and oral arguments substituted (s. 12); appeals were, as a rule, disallowed till judgment was delivered on the merits (s. 19); and, when the cause of action was within the Sheriff's jurisdiction, causes of any value might be tried by the consent of the parties (s. 23).

Another statute, 39 and 40 Vic. c. 70 (1876), was made to alter and amend the law relating to the administration of justice in civil causes in the ordinary Sheriff Courts. It has various and important enactments as to procedure, but of too minute and technical a kind to be specified here. One provision of this statute is worthy of notice; for the 46th section declares, "A person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business." Upon sufficient cause shown, the action may be remitted to the Sheriffdom of the defender's domicile.

Lastly, by the Registered Writs Execution Act of 1877, 40 and 41 Vic. c. 40, for the amendment of the form of the warrant of execution on certain extracts of writs registered in the Books of Council and Session and the Sheriff Court of Scotland, it is enacted that in all extracts of writs, deeds, or other documents which contain a clause of registration for preservation and execution, and which are registered in the Sheriff court books of any county in Scotland, and in all extracts of protests of bills, promissory notes, or banker's notes registered in the Sheriff court books, the Sheriff clerk shall insert a warrant of execution : s. 2. A similar power is given to the keeper or assistant-keeper of the books of Council and Session by s. 1. Again, it is lawful to arrest, charge, and poind by virtue of the extract and the warrant for execution thereon : s. 3.

388. *The recovery of small debts.*—For the easier recovery of small debts, it was enacted that the Sheriff might hear, try, and determine all civil causes and complaints when the debt, or demand, did not exceed £8 sterling; and that his decision was to be final, unless, within a year, an action of reduction was raised before the Court of Session for corruption, malice, or oppression of the Court : 6 Geo. IV. c. 24 (1825).

Four years afterwards, the sum was raised to £100 Scots, and the action was well brought if the claim did not exceed this amount, even although the actual debt was greater, provided the remainder was abandoned. Facilities were also granted for rehearing on decrees in absence, or absolvitor; and the decrees of one county, on payment of a fee to the Sheriff Clerk,

might be enforced in another county: 10 Geo. IV. c. 55 (1829).

Then in 1852, by 16 and 17 Vic. c. 80, the sum was raised to £12; and, in 1867, the summary procedure before the Sheriff was carried to its present extent by 30 and 31 Vic. c. 96, by which it is lawful for the Sheriff to try causes, for sums between £12 and £50, in all actions of debt that might be competently brought before him for house mails, men's ordinaries, servants' fees, merchant's accounts, and other like debts (s. 2). If required, the Sheriff is to take a note of the evidence, and pronounce findings in law and fact. When this is done, and then only, an appeal is competent from the Sheriff to the Judges of the Court of Session (s. 9). The latter statute is applicable to claims by lessees against their lessors for compensation for excessive damage to crops by game not exceeding £50: 40 and 41 Vic. c. 28 (1877). Under all these statutes, very moderate fees are chargeable, and a great boon has been conferred by them upon the community.

389. *The provisions of 9 Geo. IV. c. 29, as to crimes, evidence thereof, &c.*—After 1828, the Sheriff was not bound to take down the evidence in writing in criminal trials when there was a jury, but he was to keep notes of the evidence, which might be produced, if need be, to the Court of Justiciary (s. 17); and he was authorised to proceed summarily in crimes when the punishment asked was not greater than a fine of £10, or imprisonment for sixty days, and caution for six months.

390. *Appointment of certain officers.*—By the Act of 40 and 41 Vic. c. 50 (1877), the right of appointing

the salaried Sheriffs-substitute is vested in the Sovereign on the recommendation of one of the principal Secretaries of State (s. 3); and the appointment of Procurator-Fiscal is to be made by the Sheriff with the approval of one of the principal Secretaries of State (s. 6). These appointments formerly belonged to the Sheriffs, and the change made in regard to them is indicative of causes which will ultimately abolish the Sheriffs altogether.

391. *The ancient Commissary Courts abolished.*—The Commissary Courts, which were remnants of the ancient jurisdiction of the Church as to the personal property of deceased persons, were abolished in 1823; the Sheriffdoms of Edinburgh, Haddington, and Linlithgow were erected into the commissariat and afterwards into the Sheriffdom of Edinburgh; and the jurisdiction of the inferior commissaries was vested in the Sheriff's or Steward's depute: 4 Geo. IV. c. 97, and 6 and 7 Wm. IV. c. 41. The modern Commissary Court of Edinburgh has a special jurisdiction as to the confirmation of the personal estates of persons who have left property in Scotland, and die abroad.

392. *The modern Commissary Courts abolished.*—By 39 and 40 Vic. c. 70 (1876), the Commissary Courts were finally abolished, and their whole powers and jurisdictions were transferred to the Sheriffs.

393. *One inventory for all personal property in the United Kingdom.*—In 1858, the procedure for obtaining confirmation of a defunct's personal estate was simplified. It was made allowable to include in the inventory (which, as you may know, is an

indispensable part of the procedure in confirmation) all the personal estate of the deceased in any part of the United Kingdom (s. 9). Further, the confirmation was made equivalent to probate or letters of administration in England as to property in England. A reciprocal enactment was made in favour of England and Ireland: 21 and 22 Vic. c. 56.

A most useful statute has lately been passed in favour of executors entitled to real or personal property of small amount. The Small Estates Act, 39 and 40 Vic. c. 24 (1876), declares that, where the estate does not exceed £150, the executor may apply to the commissary clerk to fill up the inventory and to expedite confirmation. This rule dispenses with the necessity of employing solicitors in such cases, and the fees payable to the commissary clerk for his trouble are almost nominal.

394. *Justices of the Peace: Their jurisdiction in contracts.* — I have already had occasion to refer to the rise and progress of the jurisdiction of the Justices of the Peace for Scotland. I have now to say that, in 1795, by 35 Geo. III. c. 123, a very useful jurisdiction was conferred upon them for the determination of all causes in personal contracts or obligations where the demand did not exceed £40 Scots; that in 1825, by 6 Geo. IV. c. 48, the amount was raised to £5 sterling; and that, in 1849, by 12 and 13 Vic. c. 34, provision was made for rehearings, and that, by means of indorsations, the decrees of the Justices could be enforced in any county.

395. *Their control over the liquor traffic.*—The Justices, along with the Magistrates of Burghs, have the

power of granting or refusing licenses for the sale of beer, ale, and excisable liquors. No easy task is thus imposed upon them. In regulating the sale of excisable liquors the legislature has had two objects in view: first, a revenue for the national exchequer; and, second, the peace and quietness of the neighbourhood by police supervision, or, in other words, the prevention of a nuisance.

The provisions of 29 Geo. II. c. 12 (1756).— Adopting the rule in England that excisable liquors could not be sold, by retail, without a license, it was enacted that, in every burgh, and in every shire or stewartry in Scotland, no person should keep an ale-house, tippling-house, or victualling-house, or sell ale, beer, or other excisable liquors by retail, but such persons only as should be annually thereto admitted, allowed, and licensed, according to the directions contained in the Act: s. 10.

The Justices and Magistrates were authorised to meet annually to grant licenses in such numbers as the majority might think meet and convenient. Upon such licenses, a duty was to be paid to the public revenue.

Unlicensed dealers were to be convicted and fined; and, in order that licenses might not be granted for partiality or interest, no brewer, malster, distiller, or retailer of ale, &c., or a partner of such person, was allowed to act in the execution of the powers vested in the Justices and Magistrates by this statute: s. 18.

The provisions of 9 George IV. c. 58 (1828).— This Act adopts some stringent regulations as to the sale of intoxicating liquors both by those who had, and

by those who had no licenses. Thus, imprisonment or fines were imposed for breaches of license, and forfeiture of the certificate was inflicted for the third offence ; and heavier fines, and longer imprisonment in default of payment, were imposed on offenders without licenses.

The provisions of 16 & 17 Vic. c. 67 (1853).—By s. 1, it is enacted that no certificate shall be granted for the sale of spirits, wines, or excisable liquors to be consumed on the premises, unless on the express condition that no groceries or other provisions shall be sold within the period to which the certificate refers. Again, by s. 2, it is enacted that grocers may obtain certificates for the sale of porter, &c. wine, spirits, and other excisable liquors by retail, but not to be consumed on the premises. Further—creating a revolution in the trade—it was declared that licensed dealers shall not sell any liquors before eight in the morning, or after eleven at night on week days ; and shall not open their premises for sale of any liquors on Sunday.

The provisions of 25 & 26 Vic. c. 35 (1862).—The statutes of 9 George IV. c. 58, and 16 & 17 Vic. c. 67, are recited, and then new regulations are laid down. The hours of licensed public-houses, inns, and hotels are fixed at eight in the morning for opening, and eleven in the evening for shutting, on week days.

The licensed houses are to be wholly closed for traffic on Sundays, rules are made for the maintenance of order, and for the sale of liquors to travellers in hotels and inns.

When any one applies for a public-house license, any person in the district may lodge an objection with the Justices or Magistrates ; and, on intimating

his objection, will be heard thereon. This is a most useful provision.

I would only further add here that, under this statute, there is an appeal in all cases to the Court of the Quarter Sessions of the Justices from the decisions of the Justices in Petty Sessions, and from the Burgh Magistrates sitting as a licensing court.

*The provisions of 39 & 40 Vic. c. 26 (1876).—*The Act of 1876 was intended to assimilate the Law of Scotland to the Law of England as to the granting of licenses to sell intoxicating liquors. Its cardinal provisions are the following: 1. No appeal can be taken to the Court of Quarter Sessions from any decision of the Justices in any County, or the Magistrates of a Burgh, in refusing any application for a new certificate (not a renewal: s. 4) for the sale of excisable liquors: s. 5. 2. The Justices of the Peace for each county, except Edinburgh, shall, at a meeting of Quarter Sessions, appoint from among themselves a county licensing committee of not less than three nor more than twelve members: s. 6. 3. New certificates for Burghs shall not be valid, unless confirmed by a Joint Committee of the Magistrates of the Burgh and the Justices of the County in which the premises are situated: s. 8. Any person who appears before the Justices of the Peace or Magistrates, and opposes the grant of a new certificate, but no other person except the Procurator-Fiscal for the public interest, may appear, and oppose the confirmation of such grant by the confirming authority in Counties or Burghs: s. 12.

396. *Observations on the liquor traffic.*—It is no part of my scheme to enter into any disquisition on the

vexed question of the liquor traffic. I may, however, be allowed to say that numerous public-houses for the sale and consumption of intoxicating liquors diminish the sobriety, and injure the well-being of the community. I have also to say that my opinion is that the traffic in liquor is neither wrong nor immoral in itself; that it is a subject for statutory regulation, not prohibition; and that the objects of temperance reformers will be most effectually and speedily secured by the granting of licenses to well-known and highly-respectable citizens; by a strict supervision of all licensed houses with the view of compelling unadulterated liquors to be sold; by having large, open, and well-aired premises for licensed public-houses; by reducing the hours of business, as far as possible, in harmony with enlightened public opinion; and by the infliction of some notorious and severe punishment on those who frequently get drunk, and also on those who sell intoxicating liquors to habitual drunkards, or to people in a state of inebriety. The entire abolition of the liquor traffic is impossible. The evils arising out of the liquor traffic are great and deplorable; but these can be more effectually dealt with by general legislative regulations than by absolute local prohibition. The most effective means for the diminution of intemperance are, I believe, the personal regeneration of the individual, the introduction of more rational amusements amongst the masses, and the demolition or improvement of all unhealthy, ill-ventilated houses and workshops. When a man breathes impure air, and looks on physical enjoyment as his ideal of life, stimulants will always be used. In many low states of body and mind, as, for example, in persons

of nervous organization, excitable temperament, or ill-regulated intellects, large numbers of people recklessly fly to the use of intoxicating liquors to drown their cares, or give themselves a temporary feeling of pleasure and excitement. Many feel intoxicating liquors to be indispensibly necessary; and so long as this craving exists, it will be gratified in some way or another.

Before I bring this lecture to a close, allow me briefly to mention one or two alterations which have lately been made on the law of evidence and bail.

397. *Certain oaths dispensed with.*—In the administration of justice, it has been found necessary to dispense with the solemnity of oaths in certain instances. The privilege was first conceded to the Quakers, and a solemn affirmation was substituted in the place of the oath in the usual form. It was afterwards extended to all persons who, from conscientious motives, declined to be sworn in civil cases, and it was thereafter allowed in all criminal as well as civil processes in Scotland: 1 George I. st. 1. c. 6; 19 Vic. c. 25, and 28 Vic. c. 9. Persons making such declarations may be punished for perjury in the same manner as if they had given the ordinary oath.

398. *Bentham's speculations caused a revolution in the laws of evidence.*—Upon the law of evidence, very considerable changes were made during the present epoch. Generally speaking, before the days of Jeremy Bentham, stringent rules existed in our courts as to the admissibility of the evidence of relations in any civil or criminal case. In consequence, however, of the speculations of Bentham, a complete revolution has been effected in the minds of legislators

and lawyers as to the rules of evidence, and almost all restrictions on the admissibility of the evidence of relations have been removed. Doubtless, before long, all reliable evidence will be admitted in all civil and criminal proceedings whencesoever derived.

399. *Almost all restrictions on the admissibility of evidence on the ground of relationship removed.*—By 3 and 4 Vict. c. 59 (1840), it was declared that no valid objection could be made to the admissibility of any witness on the ground that he was the father or mother, son or daughter, brother or sister by consanguinity or affinity, or uncle or aunt, nephew or niece by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor should it be competent to any witness to decline to be examined, or give evidence, on the ground of such relationship: s. 1. Further, the presence in court of a witness shall not incapacitate him from giving evidence when such witness has not been influenced by so being in court, and when injustice will not be done by his or her examination: s. 3. Lastly, by 40 and 41 Victoria, c. 14 (1877)—an Act for the amendment of the law of evidence in certain cases of misdemeanour, and in any proceedings instituted to try or enforce a civil right only—every defendant to such misdemeanour or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.

400. *Bail.*—Upon the subject of bail, I have to say that, inasmuch as the sums fixed by the Acts made in 1701, and by 11 George I. c. 16, had been found

inadequate to the state of wealth in the country and the circumstances of individuals, and whereas salutary laws had therefore been rendered ineffectual and nugatory, a statute was passed in 1799, 39 George III. c. 49, by which it was made lawful to every magistrate, judge, and court of justice in Scotland, authorised by the before-mentioned act, to extend or take bail thus : namely, for a nobleman £1200 sterling, for a landed gentleman £600, for any other gentleman or burgess or householder £300, and for any other person £60.

401. *Conclusion.*—I have adverted to some important events which have occurred in the British Empire during the epoch under consideration, and which have had very considerable influence on our government, constitution, and laws. I have also pointed out the legislative and judicial changes which have taken place as regards Scotland ; and, at our next meeting, I shall consider the main alterations which have been made in the principles of our law during the epoch under review.

LECTURE VII.

FROM THE ACCESSION OF THE HOUSE OF HANOVER TO THE
PRESENT TIME—*continued*—(1714 to 1878).

FOURTH EPOCH.—BRITISH.

In my last lecture, the main subjects considered were the legislative and judicial government of Scotland. I have now to consider the development of our local government, and the changes made in our civil and criminal laws, since the accession of the House of Hanover up to the present time.

LOCAL GOVERNMENT.

The County.

402. *The Commissioners of Supply.*—The Commissioners of Supply are all owners of land in the county of a certain value, and are appointed by the crown.

As their name helps to explain, they have some peculiar duties to perform as to the national taxation. They assess the land and income taxes for the imperial exchequer,

They levied rogue money.—At the time of the passing of the Reform Act in 1832, a tax, called rogue money, was levied for apprehending, prosecuting, and subsisting criminals. As the court of the freeholders of the county was then abolished, the collection and management of rogue money was transferred to the Commissioners of Supply: 2 and 3 Wm. IV. c. 65. s. 44. A few years later, in 1839, it was enacted that, besides the purposes for which rogue money had been previously collected, it would be leviable in order to establish and maintain an efficient constabulary or police force for the county for the prevention of crime, including all charges for special constables: 2 and 3 Vic. c. 65.

Rogue money abolished, and a general tax on the county imposed.—This tax was abolished in 1868. In lieu thereof, the Commissioners of Supply were authorised to levy a general tax on all lands and heritages within the county, payable by the landlord or the tenant as the Commissioners should determine; and, if paid by the tenant, to be deducted by him from his rent: 31 and 32 Vic. c. 82. s. 4. According to a long established custom, the Counties and Burghs had to maintain prisons for the confinement of offenders. This part of local government was altogether taken away by 40 and 41 Vic. c. 53 (1877). The maintenance of those prisoners to which the Act applies are to be defrayed out of funds provided by Parliament, s. 4; and the prisons and the appointment of prison officers are vested in the Home Secretary: s. 5. Under s. 35, a small allowance may be granted to a prisoner on his discharge.

Maintenance of peace and management of county

highways.—Again, along with the Justices of the Peace, the Commissioners discharge all the duties connected with the maintenance of order in the rural districts. Moreover, along with the Justices and Representatives of the County Tenantry, they have the management of the highways, &c. beyond the burgh or town boundaries.

403. *Sketch of highway legislation.*—The advantages of good roads for easy communication with all parts of the country in a great trading community are incalculable; and different expedients have been tried in Scotland to keep the great highways in a proper state of repair. Three several modes are discernible: by contributions of materials and labour from the landowners and labourers of the neighbourhood; by tolls paid by those who used the roads for horses and carriages; and by taxes payable by the landlords and tenants of certain districts. Formerly the burden of keeping the highways and bridges in repair fell upon the owners of land; but in 1718, by 5 George I. c. 30, tenant-cottars and other labouring men were bound to work six days a year to keep in repair the highways within the bounds. This labour in repairing the public roads, otherwise called statute labour, has been converted into a money payment by 8 and 9 Vic c. 41. The second mode, although it has long existed in the country, is unsatisfactory because of its great expense, the unfairness in the distribution of the burden, and the inconvenient obstruction to public traffic. It is fast giving way to a tax upon the landlords and tenants of the rural districts. In 1875 I said that the abolition of the tolls could not take

place too soon. I have now to state in 1878 that a statute for this purpose has been carried by the present Conservative Government.

The provisions of 41 and 42 Vic. c. 51. s. 4. All existing local Acts as to Turnpike and Statute Labour Roads shall continue till 1st June 1883, unless the Act is adopted, or tolls are abolished sooner: s. 11. The management and maintenance of highways and bridges within the county shall be vested in, and incumbent on, the county Road Trustees; and, within each burgh, shall be vested in, and incumbent on, the burgh local authorities: s. 33. From and after 15th or 26th May, immediately after the adoption of the Act in any county, where the commencement shall happen before 1883, or otherwise from and after 1st June 1883, all tolls within counties and burghs shall be abolished: s. 47. The local authority shall have the management of the roads within burghs: s. 52. Assessments in counties for the management, maintenance, and repairs of roads shall be imposed on proprietors and tenants of lands and heritages in equal proportions, by a rate for each district in a county, or by a uniform rate for the county: s. 54. Assessments in burghs shall be by rates on lands and heritages paid in equal proportions by proprietors and tenants. The Act also lays down rules for its adoption before 1883, and for the representation of tax-payers in the county boards for the management of roads and bridges.

404. *Observations on county management.*—The government of the county districts is chiefly in the hands of the landowners; but it is clear that this is a state of matters which the rich tenant-farmers will not

allow to continue. How far the principle of representation will yet be based on taxation I cannot now discuss. But that the tenant-farmers will, in the future, play an important part in the government of the counties, is beyond all doubt. This gives us a glimpse at the problem of local county government, which is beginning to force itself upon the attention of politicians, and will shortly demand a practical solution.

MUNICIPAL GOVERNMENT.

405. *The ancient rights of the Royal Burgesses restored in 1833.*—The Royal Burghs of Scotland, as I have already said, obtained at an early period of our history, Royal Charters of incorporation, which conferred valuable privileges as to self-government, trade, and commerce. These exclusive privileges of trade and commerce were long, until within recent times, sedulously guarded. They were abolished in 1846 by 9 and 10 Vic. c. 17 ; and it is now lawful for any person to carry on or deal in merchandise, and to carry on or exercise any trade or handicraft in any Burgh or elsewhere in Scotland, without being a Burgess of such Burgh, or a Guild-brother, or a member of any guild, craft, or incorporation. Still further, the majority of the Burgesses gradually lost or were deprived of their ancient right to elect their Magistrates and Councillors by their own individual and direct votes ; and the Magistrates and Councillors were elected by the minority, or more usually by their own predecessors in office. But, in the year after the passing of the

first Reform Act, the close system of election was abolished, and the ancient, free constitution restored.

The provisions of 3 and 4 William IV. c. 76.—The municipal electors were declared to be the same as those who were then entitled to vote for a representative in Parliament, and provisions similar to those in the Reform Act of 1832, except as to the payment of assessed taxes, were made: s. 1.

The Provost and Magistrates were to be chosen by a majority of the Councillors: s. 17.

An annual election of Councillors was to be held, and one-third of them were to retire every year: s. 15 and 16.

The election expenses were to be paid out of the common good: s. 30.

406. *Regulations were made as to Parliamentary Burghs and Towns.* — Similar regulations were made for the election and appointment of Magistrates and Councillors of the several Burghs and Towns which returned, or contributed to the return, of a Member of Parliament, and were yet not Royal Burghs: 3 and 4 Wm. IV. c. 77 (1833).

407. *Town Councillors need not be full Burgesses.* —Till 1860, it was necessary that the Councillors of Royal Burghs should be burgesses. But, by 23 and 24 Vic. c. 7, this condition was annulled, and the Magistrates and Council of any Burgh were authorised to admit persons entitled to vote in the election of Burgh Councillors to the status of burgesses; and a fee, not exceeding 20s., was to be paid to the Burgess funds by way of qualification for the Council of a Royal Burgh, but was not to give any right to participate in the funds of the Burgess Guild.

408. *Assimilation of Parliamentary and Municipal Electors by 31 & 32 Vic. c. 108 (1868).*—After the passing of the last Reform Act, and as a necessary sequel thereto, the qualifications of the municipal electors of royal burghs, parliamentary burghs, and towns were declared to be the same as those required for the electors of a representative in Parliament, according to the extended franchise of 1868.

409. *Registers of Voters and the Ballot.*—The public registers, as in Parliamentary elections, are made conclusive evidence of the right to vote; and the votes, as you know, are given by ballot as in Parliamentary elections.

POLICE REGULATIONS OF TOWNS.

410. *Progress of Police regulations since 1833.*—From the year 1833, several acts have been passed by the legislature to enable burghs, towns, and populous places to establish a general system of police.

The provisions of 3 & 4 Wm. IV. c. 46.—Of these acts, the most important, made in 1833, was intended to establish a system of police, and confer such powers of paving, lighting, cleansing, watching, supplying with water, and improving such burghs as might be necessary. It was to be adopted by the £10 householders, who were to elect not less than five, and not more than twenty-one Commissioners. The Chief Magistrate was to preside at the meetings of the Commissioners, and the Town Council was to possess one-fifth of the representation at the Police Board. Now, however, the Com-

missioners of Police and Councillors of Burghs are, or may be, one and the same body, acting in the exercise of different functions : 25 and 26 Vic. c. 101. Taxes were to be imposed upon tenants and occupiers of houses paying £2 in rent and upwards. Watchmen and policemen were to be appointed with all the powers of constables ; and vagrants and idle persons were to be apprehended and punished.

The provisions of 13 & 14 Vic. c. 33.—In 1850, further provisions were made for the regulation of the police of towns and populous places, and for paving, lighting, and improving the same. Authority was given to impose penalties on drunken persons guilty of riotous or indecent behaviour ; and sundry regulations were made for the improvement of the sanitary condition of such towns and places, *e.g.* regarding burial grounds, slaughter-houses, adulteration of food, &c.

The provisions of 23 & 24 Vic. c. 96.—By this statute, permission was given to towns and populous places to adopt the provisions of the Police Act for sanitary purposes and other improvements, without adopting those for the establishment and maintenance of a police force.

The General Police Act of 1862.—This statute, 25 and 26 Vic. c. 101, is most elaborate in its provisions for regulating the police of towns and populous places in Scotland, and for lighting, cleansing, paving, draining, supplying water to, and improving the same, and also for promoting the public health thereof. This Act has been amended by 40 and 41 Vic. c. 30 (1878), as to the time for electing commissioners.

411. *Dwelling-houses for the labouring classes in towns.*—As intimately connected with the sanitary condition of towns, I will here give the provisions of the Acts made for the erection of Dwelling-houses for the labouring classes.

Early in the present reign, the terrible condition of many of the houses in the towns of the Kingdom attracted public attention, and the result was that the Loan Commissioners for Public Works were empowered to make advances to public companies on easy terms for the purpose of improving the dwellings of the poor, and putting an end to a state of things which was both a public calamity and a national disgrace. These measures were inadequate to cope with the evil, and accordingly, in 1868, the legislature made another attempt to deal with it.

The provisions of 31 and 32 Vic. c. 130.—The preamble of the Act states that it is expedient to make provision for taking down and improving dwellings occupied by working-men and their families, and unfit for human habitation, and for building better dwellings for such persons instead thereof.

It provides for the appointment of Officers of Health, whose duty is to report to local boards what premises are in a condition dangerous to health, so as to be unfit for human habitation. It gives power to the local authorities to compel the owners of such houses to execute all necessary works; and, where total demolition is required, authorises the local authorities to give compensation.

The provisions of 38 and 39 Vic. c. 49.—This statute was passed in 1875 and is applicable to

populous places in which there are 25,000 inhabitants or upwards, and in which the Public Health Act of 1867 has been adopted. Under it, where there is an unhealthy locality, the local authorities are to draw up a scheme for its improvement, to be approved of by a provisional order from the Secretary of State for the Home Department, and afterwards confirmed by Parliament. The local authorities, thus armed, have power to acquire all lands and houses required for their scheme, and to borrow money on mortgage; and, subject to repayment in fifty years, the Treasury is allowed to lend money on such improvements at $3\frac{1}{2}$ per cent.

Thus much as to local government properly so called. Let me now call your attention to some matters which partake of a mixed character, that is to say, are both national and local.

EDUCATION, RELIGION, AND PAUPERISM.

Education.

412. *Universities.*—By the Universities Act of 21 and 22 Vic. c. 83 (1858), various provisions were made by the legislature for the better government and discipline of the Scotch Universities, and Commissioners were appointed to revise the foundations, &c. and to alter the trusts, regulate the course of study and the exaction of fees, &c. and to report on the expediency of founding a national University, and to make arrangements for converting the Scotch Universities into Colleges of a great national University for Scotland. Much good has arisen from the labours of this Commission, and it is to be hoped that the Royal Com-

missioners, who will shortly (1875) be appointed, may be able to make such proposals as will still further extend the usefulness of our Universities. The adoption of their recommendations (1878) will largely contribute to raise the teaching, and extend the benefits of our Universities.

413. *Endowed schools and other endowed institutions : the provisions of 41 and 42 Vic. c. 48 (1878).*—By s. 4, it is declared to be lawful for any governing body of any endowed institution in Scotland to resolve that it is expedient that provision should be made for the better government and administration of such institutions, or for the better application of the endowments thereof, or for the transference of such institution and the endowments thereof, and that an application should be made to the Secretary of State for a provisional order. Further, commissioners under a remit from the Secretary of State may inquire and report to him, s. 6 ; and the Secretary of State shall have power to issue a provisional order in regard to the wishes of the governing body : s. 7.

If this statute is made use of as it should be, it will be most useful in advancing the interests of the higher education of Scotland. If it is not, its object must be carried out by more stringent regulations.

414. *Examination of Schoolmasters by 24 and 25 Vic. c. 107 (1861).*—The examination of Schoolmasters is to be conducted by the Universities instead of the Presbyteries : s. 9. The teachers in parochial and burgh schools are exempt from all religious tests : s. 12 and 27. The jurisdiction of the Presbyteries in cases of alleged immoral conduct or

cruelty of Schoolmasters is transferred to the Sheriff of the county : sec. 14.

415. *Parochial System required to be strengthened.*—It has been truly said that we may look with satisfaction and pride on our system of Burgh and Parochial Schools, established at the Reformation by Knox's influence ; for, although Knox's scheme was maimed by the greed and avarice of many courtiers, nobles, and other landlords who supported the Reformation of the Church, it was, during two centuries, amply sufficient for our national wants, and it provided a sound and tolerably high standard of education for the great body of the people. Recently, however, the vast increase of our population, and especially the tendency to settle in the great centres of industry, compelled the legislature to amend and strengthen the old system, and the Act of 1872 was the fruit of its labours.

The provisions of 35 and 36 Vic. c. 62 (1872).—A temporary Board of Education for Scotland was to be appointed by the Queen for the higher efficiency in the institution and organization of Schools and School Boards under the Act : sec. 3. This Board has since been allowed to become extinct, and its duties have been delegated to the Education Board in London.

A School Board was to be elected in, and for each and every parish and burgh, sec. 8 ; and in this local board almost all public schools were to be vested : s. 23, 24, 25, 38 and 39.

A school rate was to be imposed on all lands and heritages in the School Board area, and collected by the Parochial Board,

Parliamentary grants were to be made to the School Boards and to other school managers, provided that no grant was made for religious instruction, and that sufficient attention was paid to the wishes of parents as to religious instruction.

It is the duty of every parent to provide elementary education in reading, writing, and arithmetic for his children, between the ages of five and thirteen ; and, if he is unable to pay therefor, the Parochial Board is to do so : sec. 69. Parents in default are liable to fine and imprisonment : sec. 70.

The provisions of 41 and 42 Vic. c. 78 (1878).—By s. 5, it is enacted that a person shall not take into his employment, except as therein after provided, any child under ten years, or who being ten and not more than fourteen has not obtained a certificate of ability to read and write, and of a knowledge of elementary arithmetic, unless such child being ten or upwards is employed, and is attending school in accordance with the provisions of Acts of Parliament as to the education of children employed in labour. By s. 8 penalties are imposed on offenders against the Act.

416. *Observations on the Acts of 1861 and 1872.*—These two Acts afford good illustrations of that gradual development which is clearly to be traced in the changes which have been effected in our laws and institutions. First, the authority of the Presbyteries of the Established Church over the conduct of Schoolmasters is taken away ; and, second, the national system of education is withdrawn from the Established Church, and placed under the control of the people or their representatives.

RELIGION.

417. *Persecution of the Episcopalians.*—Considering that Episcopacy is the established religion of England, one might naturally have expected that Episcopacy in Scotland would not only have been tolerated, but favoured by the common legislature. Yet the very reverse was the case. For a long time, pastors without a license, who officiated in Episcopal meetings on this side of the Tweed, were liable to banishment and even imprisonment for life; and persons frequenting such unlicensed meetings were punished by fine and imprisonment, and were subject to various civil disqualifications: 19 Geo. II. c. 38 (1746).

Afterwards, by 33 Geo. III. c. 63, the penalties for resorting to, or officiating in, unlicensed Episcopal Churches were abrogated, and the Episcopal clergy were required to take the oaths of allegiance, abjuration, and assurance, and to subscribe the Thirty-nine Articles. Disabilities were also imposed on all those who resorted to any Church whatsoever in which prayers were not offered for the King and Royal Family; and, even down to 1812, licenses were required for places of worship where, in addition to the family, more than twenty were present. All these restrictions have now been removed.

418. *Disabilities imposed on Roman Catholics.*—Many severe laws against Roman Catholics have been already mentioned. About the end of last century, a milder course was adopted towards the adherents of the Roman Catholic Church. It was consequently enacted that Roman Catholics who took the oath of

abjuration and the declaration prescribed by 33 Geo. III. c. 44 (1793), should be entitled to hold real and personal property in the same manner as they could have done previous to 8 and 9 Wm. III. par. 1. c. 3. That oath contained a promise to bear faithful allegiance to the King and his successors, and to support and defend the Protestant succession as by law established, and also a repudiation of the power of the Pope, or other foreign potentate, in this kingdom.

419. *The provisions of the Roman Catholic Emancipation Act of 1829* (10 Geo. IV. c. 7).—This statute repealed all disqualifications as to sitting and voting in Parliament, or as to enjoying almost any public office, franchise, or civil right; and declared that a Roman Catholic might sit and vote in Parliament on taking the oath of allegiance, and the declarations to secure the Protestant succession, not to subvert the Church Establishment, and to maintain that no foreign power has any jurisdiction in this country: sec. 2 and 5. Consequently, Roman Catholics, on taking the fore-said oath, can, as a rule, hold any civil or military office in the kingdom: sec. 10. No Roman Catholic priest can sit or vote in the House of Commons: sec. 9. The suppression of Jesuits, and persons bound by monastic and religious vows, was contemplated by this Act, but was never carried out.

420. *Observations as to the laws against Episcopalians and Roman Catholics*.—Political, not religious, considerations formed the basis of these disqualifications. The Scotch Episcopalians and Roman Catholics were mostly Jacobites about a century ago, and were believed, not without reason, to have

been deeply implicated in the rebellion of 1745. Both classes were supposed to be dangerous to the Hanoverian succession and the religion established by law.

421. *Disqualifications against the Jews removed.*—The disabilities against persons professing the Jewish religion have been removed ; and a form of oath, similar to that taken by the Quakers, has been substituted for the oaths of allegiance, supremacy, and abjuration : 21 and 22 Vic. c. 48 (1858). Again, an Act of the same year, c. 149, was passed, by which either House of Parliament might modify the form of oath to be taken by Jews in place of the oaths of allegiance, &c. This statute has been acted upon by the House of Commons. No one of the Jewish persuasion can grant a presentation to an ecclesiastical benefice.

422. *The causes which led to the erection of the Free Church in 1843.*—Not having time to enter into the details of the religious controversies which arose during the epoch under review, and the ecclesiastical offshoots which they engendered, *e.g.* the United Presbyterians, I shall merely notice the chief causes which directly brought about the great Disruption in 1843, and the erection of the Free Church of Scotland.

For a century and a half, the restoration of lay patronage in the reign of Queen Anne had caused much disquietude in the country. In 1834, the General Assembly passed an Act to the effect that, if the majority of a vacant Church were opposed to a person presented by the patron to the Church, the Civil Courts should not be at liberty to accept him. This is known as the Veto Act, and was held to be

illegal both by the Court of Session and by the House of Lords.

After the adverse decision of the House of Lords on the Veto Act, a Claim of Right was presented by the appellants to the Government; and, on its being refused, those who were dissatisfied with their position in the Establishment formed themselves into "The Free Church of Scotland."

423. *The Established Church acknowledged to have the right of collation, &c.*—By 6 and 7 Vic. c. 61 (1843), the rights of collation, examination, and admission of a presentee of the patron are acknowledged by the legislature to belong to the Established Church. It was also declared to be desirable that none should be settled in a parish against whom there was any just exception. It was accordingly enacted that the Presbytery might cause the presentee to preach before them, and thereafter hear and decide upon all objections to him as the future minister of the parish; that an appeal might be taken to the General Assembly against the finding of the Presbytery; and, if effect was given to the objections, that the patron might elect another presentee.

424. *Patronage abolished in 1874.*—About thirty years later, the right of the Church Patron was abolished: 37 and 38 Vic. c. 82 (1874). By s. 3, the right to elect and appoint ministers to vacant churches and parishes in Scotland is vested in the congregations of such churches and parishes respectively. Under s. 4, the patrons are entitled to receive compensation for the loss of what the law had previously considered as a species of private property.

425. *Observations on disestablishment.*—Although Patronage was the main cause of the erection of the Free Church, and although it has now been abolished, a feeling of hostility certainly exists in the minds of a considerable number of the Scottish people against the Church Establishment. Nay more, many, especially in England, think that the disestablishment of the Church of Scotland is at hand. This is a great deal too sanguine a view to be reasonably entertained. For myself, if I were to express my own opinion and wishes, I must say I would much rather see a strong feeling of union and brotherly love existing amongst all denominations of the Protestant Church in support of the great doctrines of the Christian faith, than a series of hostile designs upon a great national and useful institution, which has long done, and is now doing, good service in the cause of virtue and religion, and whose destruction will not advance those Christian truths or habits which, I believe, the great body of the Scottish people hold to be of vital importance.

PAUPERISM.

426. *No Poor Assessment till 1845.*—Till 1845, there was no well-defined system relating to the relief of the poor in Scotland. Those who needed assistance were, for the most part, maintained by private individuals through the instrumentality of the Established Church. After the Disruption in 1843, it was impossible that this condition of things could remain; and, accordingly, a national system of relief for the

poor was adopted in 1845. The administration of the Parochial Board is sufficiently familiar to all here, and I therefore need not say anything on that branch of the subject.

*The provisions of 8 & 9 Vic. c. 83 (1845).—*One mode of levying the assessment for the poor was by a rate imposed, one-half on owners, and one-half on occupiers; another mode imposed one-half on owners, and the other half on means and substance other than lands and heritages; and again, a third mode imposed on an equal per centage of the annual value of all lands and heritages, and on means and substance: s. 34. This section was repealed by 24 and 25 Vic. c. 37; and, at present, the poor rates are leviable upon the owners and tenants of lands and heritages in equal moieties.

Persons liable for the rates might be exempted on the ground of their inability to pay the same: s. 43; and none whose income was under £30 was to be assessed: s. 48.

All assessments imposed and levied for the relief of the poor extend, and are applicable to the relief of occasional as well as permanent poor, provided always that no right is conferred on able-bodied persons, or those out of employment, to demand relief: s. 48.

No person shall acquire a settlement unless by a continuous residence of five years, during which he shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief: s. 76. This period for gaining a settlement did not

affect those who had acquired a settlement by a residence of three years, the period which had formerly given a right to a parish settlement.

427. *Observations on the Poor Laws.*—First, The great mass of the people pay by far the greatest proportion of the assessment for the maintenance of the poor, and the Poor Rates are levied not according to the ability to pay, but by a fallacious and unfair test. Second, In consequence of the recent extension of the Parliamentary and Municipal franchises, no such exemption can be made by the Parochial Board as was contemplated by the legislature in 1845, and the consequence is that great trouble and expense are incurred in vain attempts to force payment from persons who cannot pay the rates. Third, The parish is far too circumscribed for the basis of taxation, and the area ought to be greatly enlarged.

Having finished all I need say as to local government, and some cognate subjects, which partake of the nature of mixed local and national administration, I proceed to consider some of the great changes effected in the epoch under review in regard to status, heritable and movable rights, and lastly crimes.

LAWS, CIVIL AND CRIMINAL.

First—Civil.

428. *Marriage.*—In 1834, the punishment, pains, and penalties imposed by the statutes of Chas. II. and Wm. III. on priests of the Roman Catholic Church,

and ministers not belonging to the Established Church of Scotland, for celebrating marriage, and on persons whom they married, were repealed; and, after proclamation of banns, persons might be married in Scotland by clergymen who did not belong to the Established Church: 4 and 5 Wm. IV. c. 28.

Very soon, *i.e.* after 1st January 1879, proclamation of banns shall not be imperative: 41 and 42 Vic. 43. By the Act of 1878, a Registrar's Certificate of the publication of a notice of marriage shall have the same force and effect as a certificate granted by a Session Clerk of the due proclamation of banns of marriage, s. 6; notice after fifteen days' residence in Scotland is sufficient, s. 7; and, when substantial objections are made against any intended marriage, the Registrar is not to issue his certificate of due proclamation, until there is produced to him a certified copy of the judgment of a competent court that the parties are not, in respect of the alleged objection, disqualified: s. 70. False declarations of intended marriages under the Act are to be punished as perjury: s. 14.

The provisions of 19 and 20 Vic. c. 96 (1856).—This statute was passed mainly to prevent English subjects, who had crossed the border, from getting married at Gretna Green. It enacted that, after the 31st of December 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, should be valid, unless, at the date thereof, one of the parties had his or her usual place of residence in Scotland, or had lived there for twenty-one days next preceding the date of such marriage: s. 1. An irregular marriage, *i.e.* one without proclamation of

banns—or soon one without intimation by the District Registrars—may be made valid by means of an affirmation presented to the Sheriff of the county within three months after the marriage. A certified copy of the entry by the Sheriff is good evidence of the same.

429. *Conjugal rights*.—The statute of 24 and 25 Vic. c. 86 (1861), created a revolution in the legal relations of husband and wife in Scotland. Its main provisions are as follow:— 1. A wife, deserted by her husband, may apply to the Court of Session (and, by a subsequent Act—37 and 38 Vic. c. 31—to the Sheriff of the county), for an order to protect the property which she had, or might acquire, by her own industry, or to which she might succeed after the desertion. After the order of protection is obtained, the wife's property is to be held by the wife as if she were unmarried: s. 1 and 4. 2. When a married woman succeeds to property by donation or bequest, neither the husband, nor his creditors, shall be entitled to the same, until or unless a reasonable provision has been made to her for her support and maintenance: s. 10. This rule was borrowed from the practice of the English Court of Chancery. 3. A widow in Scotland was also, for the first time, to be entitled to the terce of burgage property in which her husband died infest and seized: s. 12.

The provisions of 40 and 41 Vic. c. 29 (1877).—1. “The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman acquired, or gained, by her after the 1st of January 1878, in any employment,

occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall be excluded from any money or property acquired by her after the said date through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use; and her receipt shall be a good discharge of such wages, earnings, money, or property, and investments thereof:" s. 3.

2. In any marriage which takes place after the said date, the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, and subsequent to the marriage; and any court in which any husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property:" s. 34.

430. *Entails*.—The law in regard to entails is being gradually modified; and, I believe, will ultimately be entirely repealed. In order to guard against misapprehension, I ought to say that, even although it was wholly rooted out from our laws, large estates would be kept in the hands of certain families by means of trusts and other modes of conveyance, well known to lawyers, as is now done in England by means of the English law of settlement, and by the voluntary agreement of parties.

The provisions of 10 Geo. III. c. 51 (1770).—A common condition in entails prohibits leases for longer

periods than the lives of the tenants in tail. As the cultivation of the soil was thereby greatly obstructed, and much mischief arose to the public, proprietors of entailed estates were allowed to grant leases for fourteen years from their date, and one life named and in being; or for two lives named and in being and the life of the survivor; or for any number of years not exceeding thirty-one. Moreover, as it was advantageous to the public that houses should be built, the possessor of an entailed estate might grant building leases for ninety-nine years: s. 4. Again, because it was desirable that land should be improved, it was enacted that the possessor of an entailed estate might become a creditor on such estate for three-fourths of the amount which he expended in improvements.

Observations on the principle of this Act.—I wish to call your particular attention to the reasons which are given by the legislature for setting aside the wishes of private individuals in regard to the devolution of entailed property. The public good is the ground upon which it is based; and, after all, and in spite of all that can be said to the contrary, this is the principle to which the legislator must ultimately appeal in every case, whether the subject be heritage or movables, crimes or national policy.

Family provisions and long tacks.—The Act of 5 Geo. IV. c. 87, authorised possessors of entailed estates in Scotland to grant provisions to their wives or husbands and children. This Act was extended in its operation by 11 and 12 Vic. c. 36. s. 21; 16 and 17 Vic. c. 94. s. 7; and 31 and 32 Vic. c. 84. s. 6.

Further, the statute of 6 and 7 Wm. IV. c. 42 (1836) authorised heirs of entails to make tacks of their estates at fair rents for twenty-one years, and of mines for thirty-one.

Building leases. — The Act of 31 and 32 Vic. c. 84 (1868) allows an heir of entail in possession to grant feus, or building leases, at fair and reasonable rents, for ninety-nine years, provided he does not interfere with the mansion-house.

Sweeping alterations made in 1848.—The preamble of 11 and 12 Vic. c. 36, alleges that entails in Scotland had been attended with serious evils to the heirs of entail and the community. It is therefore enacted that, under an entail made after 1st August 1848, an heir of entail, born after the date of the entail, may disentail the estate; and, when the heir in possession is born before the estate is entailed, he may do so with the consent of the heir next in possession, if he is the heir-apparent, and was born after the date of the entail. Under an entail made before 1st August 1848, the heir in possession, if born after 1848, may disentail without any consent; or, if he was born before 1848, but the heir apparent was born after 1848, he may disentail with his consent, provided he is twenty-five years of age, and subject to no legal incapacity: s. 1 and 2. This Act, therefore, will eventually enable all heirs in possession of entailed estates to acquire such estates in fee-simple. The heir of entail in possession may also sell, charge, lease, and feu under the same conditions, and even burden the estate to the extent of the rents while he is in possession: s. 4, 13, and 17. When an entail is defective in any one prohibition, it

is bad and ineffectual to all intents as an entail under the act of 1685 : s. 43.

Valuation of interests. — By 38 and 39 Vic. c. 61 (1874), when an application is made for a disentail, and when the requisite consents have not been obtained, the Court of Session is empowered to assess the value of those who have interests under entails made previous to 1st August 1848. Heirs of entail in possession may convey or bequeath the amount which they expend in improvements on the entailed estate. Further, by 41 and 42 Vic. c. 28 (1878), it is declared that, in the event of the death of the institute, or heir in possession, of an entailed estate in Scotland, the unfulfilled obligations to tenants for improvements, under s. 3 of the Act of 1874, shall devolve on the heir to the relief of the executor, s. 1 ; and that heirs succeeding to institutes, or heirs in possession, shall be legally bound to relieve the executors of the deceased from all contracts made by the deceased institute for improvements on the mansion house and offices of the entailed estate, or any other parts of the estate not under lease, and to repay the executors all sums paid by them under the said contracts : s. 2.

Fraudulent entails. — To prevent persons depriving their lawful creditors of their just debts by making away with their money in the purchase of land, and afterwards settling it in strict entail, the heir of entail in possession of an entailed estate may be adjudged or evicted for the debt or obligation of the maker of the entail.

431. *Ward-holding abolished.* — The Rebellion

of 1745, as I observed in my last lecture, made the legislature alive to the dangers arising from the powers of the feudal lords over their tenants ; and therefore ward-holding, including the casualties of ward, marriage, and recognition, was abolished by 10 Geo. II. c. 50. This statute was to take effect from and after the 25th of March 1748 : s. 1. The prohibition against alienation without the consent of the superior was also annulled : s. 9. Such a prohibition was not infrequently inserted in original charters, and was a grievous interference with that freedom which is required in a commercial country in dealing with all kinds of property.

432. *Observations as to the amendment of the law of real property.*—The law of heritage in Scotland has, of late, been greatly improved for the speedy conversion of real property into money, both by sale and mortgage. Indeed, the most inconvenient restrictions on the ownership of lands and heritages have been removed. But, without doubt, attempts will soon be made to assimilate the law of real to that of personal property. The rules of succession in real property are, in the present state of the community, indefensible ; and as regards real property in towns, the law of primogeniture ought to be at once abolished.

433. *Agricultural Hypothec.*—By 30 and 31 Vic. c. 42 (1867), corn, &c. purchased, *bona fide*, and delivered and removed, shall be free from hypothec, s. 3 ; hypothec shall not be available beyond three months after a year's rent is payable, s. 4 ; and when agricultural produce or stock is sequestrated, it shall

be incompetent to sequestrate furniture, implements, manures, &c., s. 6.

434. *Wills and Settlements*.—Vital alterations have recently been made on this subject. Wills of personal estate, made out of the kingdom by British subjects, are valid if executed according to the law of the place where they were made; and a change of domicile does not invalidate a will: 24 and 25 Vic. c. 101, s. 1 and 3 (1861).

Formerly heritage could not be disposed of by a will, but this rule was altered: 31 and 32 Vic. c. 101; and now all that is required for the devolution of heritage under a testament is that proper and sufficiently comprehensive language should be used.

In a previous lecture, I stated that the old law of Scotland was that no settlement of real estate was effectual unless the granter lived forty days after its execution, or appeared at kirk or market. This law was abrogated, in 1871, by 34 and 35 Vic. c. 81, which declared that no deed, instrument, or writing made by any person, who died after the passing of the act, should be liable to challenge or reduction *ex capite lecti*. This change in the law does not, of course, prevent deeds from being reduced on the ground of the incapacity of the granter.

No further back than forty years ago, a bastard was incapacitated from making a valid testament. But, by 6 and 7 Wm. IV. c. 22 (1836), this unjust law was abrogated; and thereafter a bastard domiciled in Scotland might dispose of movable estate by testament or last will. He always had power to dispose of heritage by a deed *de præsenti*.

435. *Intestate succession and confirmation of executor creditor.*—The statute of 4 William IV. c. 98 (1833), which was passed for the better granting of confirmations in Scotland, declares that where there is an intestate succession, and the next of kin dies before confirmation is obtained, the right to the succession is transmitted to the representatives of the next of kin, s. 1; and, further, that an executor creditor is entitled to confirmation for the amount of his sworn debt: s. 4.

436. *Restraints on accumulation.*—The Thelluson Act, 39 and 40 George III. c. 98, which was intended to restrain all trusts and directions in deeds or wills, whereby the produce or profits of real or personal estates were to be accumulated, and the beneficial enjoyment thereof postponed beyond the time limited by the Act, was extended to personal property in Scotland by the express words of the third section of the Act; and was made applicable to heritage by 11 & 12 Vic. c. 36. s. 41. Consequently, the interest or rents accruing on heritable or movable property cannot be accumulated under the direction of any testator for a longer period than twenty-one years after his death, or twenty-one years after the birth of a child in *utero* at the date of such death.

437. *Gratuitous Trustees: their rights and duties.*—By 24 and 25 Vic. c. 84 (1861), and 30 and 31 Vic. c. 77 (1867), the effect of the recent amendments of this branch of the law is—1. that gratuitous Trustees are liable only for their own acts and intromissions, and not for the acts and intromissions of their co-trustees, and are not liable for their own omissions;

and 2. that all the powers which were usually inserted in trust deeds are implied by law.

Generally speaking, trust funds may be invested in Government stocks, public funds, or securities, of the United Kingdom, or Bank of England stock, or lent on such stocks or funds, or on security of heritable property in Scotland. Profits from trading with trust funds belong to beneficiaries, and losses therefrom fall on trustees. No trust funds, without testator's authority, can be lent on personal security, and trustees are responsible for loans on insufficient heritable security. Trustees becoming partners of a joint-stock company as trustees are liable to their co-partners and their creditors in their individual character, unless exempted by express stipulation. *Vide* Nicholson's Ersk. vol. ii. p. 679.

438. *Life-rents allowed in movables.*—Till within the last few years, no life-rent in movables was permitted by the law of Scotland; and, consequently, where personal property was left to any one in life-rent, it vested absolutely in such person in fee. This rule was abrogated in 1868 (31 and 32 Vic. c. 84), and a life-rent may now be granted to a person living at the date of the deed creating the life-rent, and the fee or absolute interest vests in the person to whom the property was intended ultimately to belong.

439. *Presumption of ownership by possession.*—This principle was adopted by the legislature, in 1825, by 6 George IV. c. 94, and is very advantageous to the commercial world. The circumstances to which this rule applies are as follow: When a person has possession of property for consignment or sale, he shall be deemed

the absolute owner, where there is no fraud, or breach of fair and honest dealing, on the part of a purchaser or mortgagee who has advanced his money in a bonâ fide transaction; and the purchaser or mortgagee shall be held to be dealing with the real owner.

440. *Sea Insurance.*—To prevent the disasters which frequently arose from the excellent institution of marine insurances by their conversion to purposes of mere wagering, it was enacted that, from and after the 1st of August 1746, no assurance should be made on any ship belonging to His Majesty, or any of His Majesty's subjects, or on any goods, merchandises, or effects laden, or to be laden, on board of any ship, interest or no interest; or, without further proof of interest than the policy; or by way of gaming or wagering, without the benefit of salvage to the assured: 19 Geo. II. c. 37. The policy itself must be in writing, upon paper duly stamped, and for a period not beyond twelve months: 30 and 31 Vic. c. 23. s. 8.

441. *Liability of ships and shipowners for negligence.*—A statute, 55 George III. c. 159, was made, in 1813, by which, under certain limitations, no shipowner was liable for any act, neglect, matter, or thing done, omitted, or occasioned without his fault or privity, to any goods on board his ship, beyond the value of the ship and freight. Subsequently, by 25 and 26 Vic. c. 63 (1862), his liability was restricted to a certain sum per ton of registered tonnage. This fixed sum varies with circumstances.

442. *Rights of Innkeepers.*—By 41 and 42 Vic. c. 38 (1878), it is enacted that the landlord, proprietor, keeper, or manager of any hotel, inn, or licensed

public-house shall, in addition to his ordinary lien, have right absolutely to sell and dispose, by public auction, of any goods, &c., deposited or left with him, when the person depositing or leaving such goods shall be or become indebted to the said innkeeper for board or lodgings, or keep or expense of any horse or other animals; provided that no sale shall take place till after six weeks of the debt being incurred, and that the surplus, after the payment of the debt, shall, on demand, be paid to the person depositing, and also that the debt shall not be any other or greater than the debt for which goods could have been retained by the innkeeper under his lien. By a previous Act, 26 Vic. c. 41 (1863), an innkeeper's liability to make good to any guest any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except the goods or property were lost by wilful default, or were expressly deposited for safe custody.

443. *Partnership with limited liability.*—In 1857, a most important principle was introduced into our law, by which a partnership, with limited liability, might be entered into. When the limited liability in partnership was first adopted, there was a prohibition against the formation of banking companies based on this elastic principle. But, within a year, by 21 and 22 Vic. c. 91, the restriction was removed, but it was provided, by s. 1, that no banking company, claiming to issue notes in the United Kingdom, should be entitled to the privileges of limited liability in respect to such issue, and that the shareholders shall be liable

for the whole amount of the issue in addition to the sum for which they would be liable as shareholders of a limited company. All limited liability companies must be registered in a record kept for the purpose. Recent events would appear to show that very stringent laws ought to be adopted against the directors of limited and even unlimited Public Companies; and to restrain limited liability Companies from trading largely beyond the amount of their subscribed capital.

The principle of limited liability was allowed, for the first time, in regard to Industrial and Provident Societies, by an Act of 1876, 39 and 40 Vic. c. 45. Societies registered under this Act may hold, purchase, or lease land, and sell, exchange, mortgage, or build upon the same; advance money to their members on real or personal property; invest their money on shares; and the profits may be applied to any lawful purpose: s. 12. These societies may be dissolved by order or resolution made as directed in regard to companies by the "Companies' Act, 1862" (25 and 26 Vic. c. 89).

444. *Banking*.—As early as 1819, 58 Geo. III. c. 62, an Act was passed for the praiseworthy object of protecting Savings Banks in Scotland. These Banks were established in order to afford a safe investment for small savings, and great facilities were afforded for the payment of the deposits to the depositors, and their executors.

The free issuing of notes for small amounts was found to be highly dangerous to the peace and prosperity of the country, and penalties were accordingly inflicted on all persons other than those authorised who issued notes, payable on demand, for less than £5; and also for uttering or negotiating notes, bills of

exchange, &c. which were transferable, for less than £5: 8 and 9 Vic. c. 38. s. 18 (1845). By s. 7 of the Act of 1845, the circulation of bank notes is limited to the amounts certified by the commissioners of stamps and taxes, and the monthly average amount of gold and silver coin held by bankers at their head office during the same period of four weeks: s. 6. The notes of the Bank of England are not a legal tender in Scotland: Ibid. s. 15.

445. *Crossed cheques*.—To amend the law relating to crossed cheques, an Act was passed in 1876—39 and 40 Vic. c. 81—by which the words “and company,” or simply with two parallel transverse lines, or with the name of banker across the face of a cheque, are to be deemed material parts of the same, and payment can be made only through a banker, or through some particular banker, as the cheques are generally or specially endorsed.

446. *Acceptance of bills*.—Doubts having arisen as to the true meaning of the 19 and 20 Vic. c. 60. as to acceptances of bills of exchange, it is enacted by 41 and 42 Vic. c. 13 (1878), s. 1, that an acceptance of a bill of exchange shall not be deemed to be insufficient under the provisions of the statute of 19 and 20 Vic. c. 97, and 19 and 20 Vic. c. 60 (1856), by reason only that such acceptance consists merely of the signature of the drawer written on such bill.

447. *Imprisonment and arrestment for small debts abolished*.—The Act of 5 and 6 William IV. c. 70 (1835) states, in the preamble, that great hardship had frequently been suffered by poor persons in consequence of their imprisonment for civil debts of small

amount, without any adequate advantage being obtained by the creditor; and declares that, after the first of January 1836, imprisonment for future contracted debts not exceeding £8 6s. 8d. should be abolished. This Act does not extend to imprisonment for fines or forfeitures.

Again, arrestment of workmen's wages, unless for alimentary provisions, rates, taxes, or unless the wages exceed 20s. a week, was declared to be illegal for subsequently contracted debts: 33 and 34 Vic. c. 63 (1870).

448. *Sequestration*.—The effect of a sequestration in Scotland is to vest in the trustee under the bankruptcy all the movable estate which he can recover in Scotland or elsewhere, all the bankrupt's heritage in Scotland, and also all his real estate in England and Ireland and other British dominions; and, as the general rule as to movables in all civilized nations is *mobilia sequuntur personam*, the whole personal estate wherever found usually, yet not always, vests in the trustee. Moreover, property acquired before the bankrupt's discharge falls under the sequestration.

When a firm of several partners is sequestered its creditors are entitled to rank on its estate for the full amount of their debts, and also to rank *pari passu* with private creditors on the personal estates of each of the partners for the balance unpaid to them out of the partnership assets; but the creditors of the individual partners are entitled to rank only on the personal estate of the partner to whom credit was given. The law of England is different. Thus, in England, the creditors of the individual partners are

entitled to full payment of their debts out of the personal estate of their debtors before any partnership debts can be ranked on the personal estate. This last rule is subject to an exception where, in consequence of fraud by the partners, a creditor is entitled to a right of election to rank on the partnership or the individual estate. Hence, compared with the law of England, the law of Scotland is more favourable to commercial dealings than to private domestic transactions. Why there should be this difference in the laws of the two countries is not at all clear; and, considering their intimate commercial relations, the distinction is certainly anomalous.

Numerous statutes have been passed in regard to sequestration. They are, or ought to have been, based on two fundamental principles: First, that as soon as a debtor becomes insolvent his inadequate estate ought to be the common property of his creditors; and, second, that where the debtor has made a full and fair surrender of his whole property, he is entitled to be freed from his debts.

The provisions of 12 Geo. II. c. 72 (1772). The statute of 1772 was the first sequestration Act. It ordained that, on a debtor's bankruptcy, and upon a petition to the Court of Session by any creditor, a sequestration of his estate should be awarded; that the granting of sequestration should equalize all arrestments and poindings used within thirty days of the petition; and that the estate should vest in a factor or trustee for behoof of the creditors. In 1772, great alarm was caused by the novel arrangements of this Act; but this had subsided in 1783, when the Act was renewed.

By the statute of 23 Geo. III. c. 18 (1783), sequestration was restricted to the estates of merchants and manufacturers, and the administration was based on a system of private trust under the immediate control of the Court of Session.

The Act of 1783 was continued by 33 Geo. III. c. 74 (1793), and was again renewed in 1814 by 54 Geo. III. c. 137, and remained in operation till 1839. After most ample discussion, the legislature passed 2 and 3 Vic. c. 42, and subsequently, in 1853, 16 and 17 Vic. c. 53. In 1856, an Act, 19 and 20 Vic. c. 79, was passed, and was substantially a re-enactment of the statute of 1839. The Act of 1856 has two new provisions: First, That sequestration shall extend to all persons; and, Second, That it may be awarded by the Sheriff Court as well as by the Court of Session.

Another statute, 19 and 20 Vic. c. 91, re-enacts certain provisions of the Act of 1783 as to arrestments, poindings, securities for cash credits, and reduction of future to present debts. Modified, these are as follow:

1. When a person is notour bankrupt under the Act of 1696, and as the same had been extended, "all arrestments which shall have been used for attaching any effects of such bankrupt within sixty days prior to the bankruptcy, or within four calendar months thereafter, shall be ranked *pari passu* in the same manner as if such arrestments were of the same date as the bankruptcy;" and, if any preference had been obtained, the creditor who had obtained it was liable to the estate for its amount: 34 Geo. IV. c. 74 (1793).

2. Poinders with a partial preference—which was

afterwards repealed in 1856, by 19 and 20 Vic. c. 79—were to be placed in the same position as arresters: *Ibid.* s. 6.

3. A preference is given to bankers claiming the sums due on cash credits, where the debtor's lands had been given in security, and a definite amount for principal and interest had been fixed: *Ibid.* s. 12.

4. Future debts shall be reduced to debts payable *de praesenti*; and where a creditor has a lien, he is to deduct its value from his debt, and rank for the balance: *Ibid.* s. 37 and 39.

Sequestration may now be adopted in all cases where a person is due £50 to one person, or £70 to two persons, or £100 to three, and cannot pay his debts: 19 and 20 Vic. c. 79. s. 14.

449. *Cessio Bonorum*.—By 6 and 7 William IV. c. 56 (1836), actions of *Cessio Bonorum* might be raised in the Sheriff-Court instead of the Court of Session as was formerly necessary; and the dyvours' habit, long gone into disuse and forgotten, was abolished.

Second—Criminal.

450. *Treason and sedition against the Sovereign and Government*. — For the safety and preservation of the Sovereign's person and Government against treasonable and seditious practices and attempts, the statute of 39 George III. c. 7, declared that, if any person shall, within the realm or without, compass, imagine, invent, devise, or intend death, or destruction, or any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the

person of the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or any of His Majesty's dominions or countries, or to levy war against His Majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses, or either House of Parliament, or to move or stir up any foreigner or stranger with force to invade this realm, or any other of His Majesty's dominions or countries under the obedience of His Majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, or by any other overt act or deed, and being legally convicted thereof, upon the oaths of two lawful and creditable witnesses upon trial, or otherwise convicted or attainted by due course of law; then every such person so as aforesaid offending shall be deemed, declared, and adjudged to be a traitor, and shall suffer the pains of death, and also suffer forfeiture as in cases of high treason.

451. *Regulation of trials in high treason and misprision of treason.*—For the regulation of trials in high treason and misprision of treason, the statute of 39 and 40 George III. c. 93 (1800), ordained that, in all trials of high treason, in compassing or imagining the death of the King, and the misprision of such treason, where the overt act or acts of the treason alleged in the indictment shall be the assassination or

killing of the King, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered, or his person suffer bodily harm, the person tried shall be arraigned as if for the murder of one of the King's subjects; but, on conviction, execution shall be done as in other cases of high treason.

452. *Punishment of high treason.*—The traitor is to be drawn on a hurdle, hanged till he is dead, his head to be severed from his body, and his body to be quartered, and be at the disposal of the King and his successors. The Sovereign may, however, give orders as to the conveying, hanging, and disposing of the traitor's body: 54 George III. c. 146 (1814). In the case of females, the execution is by hanging: 30 Geo. III. c. 48. In addition to the direct punishment, a conviction of treason involves a confiscation of the traitor's movable property, a forfeiture of all honours and all heritable estate in fee simple, and a corruption of blood by which no succession to him, nor through him, can take place.

453. *No corruption of blood except in treasons and murders and abetting the same.*—The corruption of blood, which was an incident of the conviction for treason, was, by 54 George III. c. 146, taken away except in certain cases. Further, it was enacted that thereafter no attainter for felony, except in crimes of high treason, or crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person other than the right or title of the offender, and during his or her natural life only; and that it shall be lawful to

every person to whom the right or interest of any lands, tenements, or hereditaments after the death of any such offender should or might have appertained if no such offender had been to enter into and enjoy the same.

454. *Counsel may defend prisoners charged with high treason.*—The right of persons who were impeached for high treason, whereby any corruption of blood may be made, or for any misprision of such treason, to be defended by counsel was, for the first time, allowed by 20 George II. c. 30 (1747).

455. *Lese-Majesty, sedition, and blasphemy.*—Formerly severe punishments were inflicted for these offences; but, early in this century, a milder spirit began to be infused into our criminal jurisprudence. Thus, in 1825, the punishment for these offences was restricted to fine or imprisonment, or both, at the discretion of the Court, for the first offence; for the second offence, the same as the first, or banishment: 6 Geo. IV. c. 47. The punishment was again modified in 1837, and restricted to fine or imprisonment: 7 Wm. IV. and 1 Vic. c. 5.

456. *Rioting.*—The Riot Act of 1714 was passed to prevent tumults and riotous assemblies, and for the more speedy and effectual punishment of rioters. Its main provision is to this effect: Where twelve persons or more are unlawfully, riotously, and tumultuously assembled, and when, by proclamation, they have been ordered to disperse by a Justice, or other Magistrate, and they do not disperse for an hour after command or request, they are guilty of felony without benefit of clergy, and liable to capital punish-

ment: 1 Geo. I. s. 2. c. 5. The Riot Act has been amended by 7 Wm. IV., and 1 Vic. c. 90, and 20 and 21 Vic. c. 3, and the offence of rioting is now punishable by penal servitude for life, or not less than fifteen years, or by imprisonment for not more than three years.

457. *Against foreign enlistment.*—The statute of 59 Geo. III. c. 69, passed in 1819, was intended to prevent the enlistment or engagement of His Majesty's subjects to serve in foreign service, and the fitting out or equipping, in His Majesty's dominions, vessels for warlike purposes, without His Majesty's license. Its main provisions are as follow: That, without the royal license, no natural-born subject shall enter into the service of any foreign power or potentate, or agree so to do; and if any shall do so, or hire any one to do so, in any part of His Majesty's dominions, he shall be guilty of a misdemeanour, and liable to fine and imprisonment at the discretion of the Court. That no ship shall be fitted out in the King's dominions with the intent that it shall act in a hostile manner on the seas for or against any foreign power or potentate, and the offender shall be liable to fine and imprisonment, and the ship seized and condemned. That no British subject within the British dominions shall increase the armament of a foreign war vessel without leave or license, and offenders shall be liable to fine and imprisonment.

The Amendment Act of 1870 cast the presumption in suspicious cases on the shipbuilder. In time of war between two governments with whom as a nation we were at peace, it gave a wider scope to the

authority of the various officers of the executive, military, naval, and revenue departments of the State to seize and detain ships of a suspicious nature; and gave compensation out of the National Treasury to those who were injured by the undue exercise of the powers granted under this Act: 33 and 34 Vic. c. 90.

458. *Piracy*.—Acts of hostile depredation committed on the high seas without a commission from any state to authorise them are piracy. By the common law of Scotland, the punishment of piracy is death; but, where the offence is not aggravated, probably, the extreme pains of the law would not be inflicted.

For the more effectual suppression of Piracy, persons trading with or corresponding with pirates, or furnishing them with stores, are guilty of piracy, and shall suffer death, loss of lands, goods, and chattels; and accessories are to be deemed principals; and masters or seamen not defending themselves against pirates forfeit their wages, and are to suffer six months' imprisonment: 8 Geo. I. c. 24 (1721). In England, by 7 Wm. IV., and 1 Vic. c. 88, the court has a discretion to inflict a less sentence than death in cases of piracy, where the acts done did not directly endanger the lives of the lieges.

459. *Attempts to murder*.—For the more effectual punishment of attempts to murder, the legislature, in 1829, ordained that persons wilfully, maliciously, and unlawfully shooting, stabbing, administering poison, or attempting to suffocate, strangle, or drown any person, shall be liable to suffer death; and the same punishment shall be inflicted on persons who wilfully, maliciously, and unlawfully throw sulphuric

acid or other corrosive substance at any person. If the crime would not have been murder had death ensued, capital punishments shall not be inflicted: 10 Geo. IV. c. 38.

460. *Concealment of pregnancy*.—In 1809, the harshness of the statutes of William and Mary, whereby concealment of pregnancy, and not calling for or making use of assistance at birth, and when the child was dead or amissing, was, on conviction, punishable with death, was softened; and imprisonment, not exceeding two years, was substituted in its place: 49 Geo. III. c. 14.

461. *Embezzlement*.—Honesty in the performance of certain trusts does not seem to have increased with the material prosperity of the nation. Consequently, an Act, applicable to Great Britain and Ireland, was passed in 1812, for the more effectual prevention of embezzlement of securities for money and other effects left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attorneys, or agents.

The provisions of 52 Geo. III. c. 63 (1812).—If any person with whom any ordnance or exchequer bond, deeds, or other security for money, shall have been deposited, or for any general or special purpose, without authority to sell, &c., shall sell, negotiate, transfer, assign, pledge, embezzle, or secret to his own use such bond, &c., in violation of good faith, and contrary to the special purpose for which the same came into his hands, and with intent to defraud the owner, then he shall be guilty of a misdemeanour, and, in Scotland, shall be punished by fine or imprisonment, or either, the imprisonment not exceeding fourteen years:

s. 1 and 7. A similar enactment is made as to deposits, &c. made with bankers, and others, for investment : s. 2.

The provisions of 6 Geo. IV. c. 94 (1825).—A few years later, greater protection was given to the property of merchants and others who had entered into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents. Thus, if any person entrusted with goods in the United Kingdom shall deposit or pledge the same, and apply or dispose of the money or value for his own use, contrary to good faith, he shall be guilty of a misdemeanour, and liable to fourteen years' transportation (now penal servitude).

462. *False pretences.*—By 13 Geo. II. certain provisions are made as to persons obtaining money on false pretences ; and in 1812, by 52 Geo. III. c. 64, these are extended to persons so obtaining bonds or other securities. The words of the statute are that all persons who knowingly and designedly, by false pretence or pretences, shall obtain any money or security, with intent to cheat or defraud any person, or knowingly send a letter threatening to accuse of any crime which is punishable by death, transportation, pillory, or other infamous punishment, and thus obtain any bond or other security for money, shall be considered offenders against the public peace, and be liable to be punished as if they had obtained money by false pretences. Subsequently, (1823), if any one knowingly and wilfully sent or delivered a threatening letter with the view to extort money, or the like, he is guilty of felony, and liable to be transported

(now to be sentenced to penal servitude), for not less than seven years, or imprisoned not exceeding seven years : 4 Geo. IV. c. 54.

463. *Unseaworthy ships*.—By 39 and 40 Vic. c. 80 (1876), several useful provisions are made in order to prevent life and property from being endangered by the conduct of reckless owners or captains of unseaworthy ships. Every person who sends or attempts to send, or is a party to sending, or attempting to send a British ship to sea, in such an unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanour, unless he proves that his conduct was reasonable and justifiable under the circumstances. There is a similar provision as to every master of a British ship who knowingly takes the same to sea in an unseaworthy state : s. 4. There are also provisions as to the detention of foreign unseaworthy ships, s. 13 ; the stowage of grain cargo, &c., s. 22 ; penalty for carrying deck loads of timber in winter, s. 24 ; and for making deck lines, load lines, and penalties for offences in relation thereto, s. 25 to 28.

464. *Pollution of Rivers*.—The statute of 39 and 40 Vic. c. 75 (1876) applies to this subject. Its principal provisions are contained in s. 4 and 5, where the offences created by the statute are specifically expressed as regards liquid and solid pollution, which, unless it is shown to the satisfaction of the Court having cognisance of the case that the best practicable and reasonable available means to render harmless the poisonous, noxious, or polluting liquid or solid so falling or flowing or carried into the stream, is to be deemed a

misdemeanour. The offenders against the Act may be obliged to carry out the best practicable and available means to abate the nuisance, and are liable to penalties for non-compliance.

I shall now direct your attention to the course of recent legislation as to the relations of workmen and their employers.

465. *First, As to workmen :*

*The provisions of 36 Geo. III. c. 111 (1796).—*This Act was made to prevent unlawful combinations of workmen employed in making paper. All contracts, covenants, or engagements between journeymen paper-makers to obtain an advance of wages; or lessen the hours of labour, or prevent or hinder persons employing whomsoever they wished, are null and void : s. 1. Offenders were liable to be imprisoned for two calendar months with hard labour.

This Act is unjust in endeavouring to prevent combinations to raise wages, but is perfectly right in attempting to protect employers in taking such workmen as they please into their service.

*The provisions of 69 Geo. IV. c. 129 (1825).—*Under this statute, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman to depart from his hiring, return his work, or prevent, or endeavour to prevent, any person from hiring himself, or accepting work, or use violence, threats, or intimidation to force another to be a member of a club, or force, or endeavour to force, trade into another way, or to limit

the number of apprentices, such person shall be liable to imprisonment with hard labour for a period not exceeding three months. It is also expressly declared that the Act is not to affect persons agreeing as to the rate of wages or prices they shall demand, or the hours or time they should work ; and shall not apply to persons fixing the wages they are willing to pay or the time they shall allow for work.

*The provisions of 38 and 39 Vic. c. 90 (1875).—*Enlarged powers are given by this statute to the Justices and the Sheriffs over disputes between employers and workmen. Whereas the guiding principle of former legislature was to inflict imprisonment in most of these disputes, compensation in damages is now substituted.

*The provisions of 38 and 39 Vic. c. 86 (1875).—*This statute makes a considerable advance towards fairness and equality by amending the law of conspiracy and protection of property. An agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime ; and, where punishment is inflicted on summary conviction, imprisonment shall not exceed three months. There are special provisions for breach of contract by persons employed in the supply of gas or water ; and breaches of contract involving injury to persons or property are more severely punished than ordinary breaches of contract.

Every person who, with a view to compel any other person to abstain from doing, or to do any act which

such other person had a legal right to do, or abstain from doing, wrongfully and without authority, does certain acts which I shall mention, shall, on summons and conviction, be fined not exceeding £20, or be imprisoned not exceeding three months, with or without hard labour. These acts are as follow :—

1. Uses violence towards, or intimidates such other person, or his wife and children, or injures his property.

2. Persistently follows such other person about from place to place.

3. Hides any tools, clothes, or other property owned or used by such person, or deprives or hinders him of the use thereof.

4. Watches or besets the house, or other place, where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place.

5. Follows such other person with two or more persons in a disorderly manner in or through any street or road.

466. *Observations.*—According to the most enlightened principles of government, all class legislation ought to be abrogated and annulled, and that whether it affects capitalists or workmen, or any other class or classes. All should, in general, be obliged to fulfil their contracts, and no laws should be made by the State with the view either of raising or lowering wages. Neither prices, nor wages, can, directly nor indirectly, be fixed by Act of Parliament, without doing more harm than good. I therefore hope that the subject of political economy, about which there is so much wide-spread ignorance, will not be forgotten by the University of St.

Andrews in the lectures which will (1875) be delivered under its auspices, and by its professors; because I firmly believe that, if capitalists and workmen were a little more enlightened as to the true principles of commercial prosperity, less would be heard of those deplorable strikes which cause so much loss and hardship to all, and that a more friendly spirit would arise between the parties whose interests are so frequently thought to be antagonistic, and yet are, in truth, inseparably connected both in prosperity and adversity. All the laws which had been made in England and Scotland, by which Justices and Magistrates were empowered to fix the rate of wages, and the prices of work, for artificers, labourers, and craftsmen, were, in 1813, most properly repealed.

467. *Second, as to Employers of Labour:*

*The provisions of 42 Geo. III. c. 73 (1802).—*At the beginning of this century, it was ordained by the legislature that, for the preservation of the health and morals of apprentices and others employed in cotton and other mills, and cotton and other factories, laws should be made for enforcing cleanliness, and obtaining a due supply of fresh air into the rooms and apartments connected with such works; for supplying the apprentices with a complete suit of clothes once a year, comprehending suitable linen, stockings, hats, and shoes; for limiting the hours of work of apprentices to twelve hours a day, between six in the morning and nine in the evening; for compulsory instruction in reading, writing, and arithmetic for the first four years of apprenticeship during the usual hours of work; for instruction in religion and attendance at Church of

apprentices; and for the appointment of Inspectors by the Justices to report as to the Act being obeyed.

Numerous Amendment Acts.—Since the Act of 1802, several regulations have been enforced as to the labour of children and young persons in mills and factories in the United Kingdom, *e.g.* 4 Wm. IV. c. 103; 7 and 8 Vic. c. 15; and 10 and 11 Vic. c. 29. I need not mention all these Acts; for I have not time even to summarize their various and intricate provisions. I can only refer to two or three statutes of a later date, and that very briefly.

13 and 14 Vic. c. 54 (1850).—No young person, or female, not above eighteen can be employed in any factory before six in the morning, or after six in the evening, save as therein provided.

16 and 17 Vic. c. 104 (1853).—The principle of the Act 1850 was extended, and, in 1853, the legislature declared that no child should be employed in any factory before six in the morning, or after six in the evening of any day (save to recover lost time as therein provided); and no child should be employed in any factory either to recover lost time, or for any other purpose, or any Saturday after two p.m. Power was also given to sanction the employment of children from seven to seven during a part of the year.

27 and 28 Vic. c. 48 (1864), and 30 and 31 Vic. c. 103 and 146 (1867).—The Factory Acts were extended to certain employments in 1864, and still farther in 1867. The object of all these Acts was to bring under proper supervision all workshops where a considerable number of persons are engaged, and

to throw the protection of the laws over the weak, and to prevent them from being made the helpless victims of avarice and recklessness.

37 and 38 Vic. c. 44 (1874).—The statute passed last year, as you know, provided for a still greater diminution of the hours of labour of women and children.

41 and 42 Vic. c. 16 (1878).—By this statute the laws relating to factories and workshops are consolidated.

468. *Witchcraft, sorcery, and enchantment*.—In 1736, the legislature repealed the laws enacted in the sixteenth century, and declared that no person should thereafter be prosecuted for witchcraft, sorcery, enchantment, or conjuration, or for charging another with any such offence in any Court in Great Britain. Thenceforward any pretender to any of these arts was to be liable to be imprisoned for a year, without bail or mainprize, and once a year should stand in the pillory an hour, and find security for good behaviour, and be imprisoned until security for future good behaviour was given : 9 Geo. II. c. 5.

Looking back to these repealed laws, and the criminal trials which took place under them, I cannot help remarking that, when the mind is debased by superstition, or too great a dread of the supernatural, there is nothing too ridiculous to be approved, and nothing too cruel to be perpetrated in the name of religion and morality. How necessary, how indispensably necessary, an enlightened philosophy and a rational system of scientific truth are as handmaidens

to religion and justice, can only be rightly understood by those who are acquainted with the histories of ancient criminal laws, which record the weakness, extravagance, and gradual enlightenment of the human mind, and which graphically portray the effects of a tyrannical government and of a superstitious priesthood.

469. *Torture*.—In ancient times, torture to compel confessions of crimes would appear to have been frequently used, and the detestable practice was not abandoned till the last century. We ought to be thankful that prisoners are no longer forced to make confessions by means of revolting bodily inflictions, by which the intellect and even the life of the accused were endangered. On the other hand, I do not believe that public justice would suffer by a fuller examination of a prisoner, when on his trial, than, according to our present practice, we tolerate and insist upon in the supposed, but frequently imaginary interest of justice and fairness.

470. *Treatment of insane prisoners*.—For the treatment of the insane, who are charged with offences, many humane regulations have been made. The result of these is, that such persons are placed in confinement during the Sovereign's pleasure: 39 and 40 Geo. III. c. 94 (1800); 9 Geo. IV. c. 34 (1828); 4 and 5 Vic. c. 60 (1841); 20 and 21 Vic. c. 71 (1857); and 34 and 35 Vic. c. 55 (1871).

471. *Female whipping abolished, and penal servitude substituted for transportation*.—Whipping of females was abolished, in 1820, by 1 Geo. IV. c. 57; and, in consequence of the complaints of our colonies, penal

servitude was substituted for transportation by 20 and 21 Vic. c. 3 (1857).

472. *Observations on prison labour and diminution of crime.*—How far the labour of criminals might be more profitably utilized than at present is a subject highly deserving the consideration of philanthropists and legislators; for, beyond all doubt, the maintenance of our criminal population is a heavy burden on the industrious portion of the community. Without embarking into the details of so vast a subject, I have no hesitation in saying that the most effectual means for the prevention of crime in all its forms is to be found in the bringing up of the young in habits of industry, sobriety, and morality. I believe that the recent legislation of the present government—*vide*, the Prisons Act of 1877—will help to place the criminal classes more completely under the control of the public authorities, bring about an efficient and rational division of criminals, and diminish the expense of maintaining offenders.

473. *Extradition.*—A great many statutes have been passed in regard to the extradition of criminals to and from foreign governments. The general import of these is that persons charged with serious crimes, such as murder, false coining, rape, robbery, assault at sea, may be surrendered by the British judicial authorities, or obtained from the respective governments with whom we have entered into treaties on this subject; and that the Council of the Queen may make orders to carry out the Acts. At the same time, no person in Britain can be surrendered to a foreign state in consequence of his being charged with a

political offence. As this kingdom is pre-eminently the land of freedom, in which no slave can breathe, so it is an asylum for the political exile from every country in the world.

474. *Conclusion.*—The doubts which I entertained as to the propriety of delivering a popular course of lectures on the Government, Constitution, and Laws of Scotland have long ago been dissipated ; and I am glad to think that so many of my former fellow-townsmen have taken a real and hearty interest in the subjects upon which I have spoken in this hall. Let me hope that our investigations have endeared to you the inheritance of freedom and just laws which we have received from our ancestors ; and that the time is not far distant when our glorious Constitution may, advantageously to the nation, be more than ever identified with the national life, and when the laws of the whole British Kingdom will not only be made accessible, but, by means of codification on a scientific basis, be also made easily intelligible to all Her Majesty's subjects. The codification of our laws—of our legal rights and duties, and of the means by which they can be enforced—is a subject of paramount importance, and ought to be undertaken by the legislature without delay.

As the most effectual means for obtaining this and other necessary reforms, the people of Scotland would, I believe, act wisely by insisting upon the appointment of a Secretary of State for Scotland to assist the Principal Secretary of State for the Home Department in the management of our national affairs. Such an

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official as here suggested must be appointed, or the Lord Advocate, with an adequate salary, should be induced to devote himself almost exclusively to the public business of Scotland.

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